DOCKET

No. 08-1555

Title: Mohamed Ali Samantar, Petitioner

v.

Bashe Abdi Yousuf, et al.

Docketed: June 19, 2009

Lower Ct: United States Court of Appeals for the Fourth Circuit

Case Nos.: (07-1893)

Decision Date: January 8, 2009

Rehearing Denied: February 2, 2009

Questions Presented

Date	Proceedings and Orders
Apr 20 2009	Application (08A928) to extend the time to file a petition for a writ of certiorari from May 3, 2009 to June 18, 2009, submitted to The Chief Justice.
Apr 23 2009	Application (08A928) granted by The Chief Justice extending the time to file until June 18, 2009.
Jun 18 2009	Petition for a writ of certiorari filed. (Response due July 20, 2009)
Jul 7 2009	Order extending time to file response to petition to and including September 3, 2009.
Aug 28 2009	Brief of respondents Bashe Abdi Yousuf, et al. in opposition filed.
Sep 9 2009	DISTRIBUTED for Conference of September 29, 2009.
Sep 11 2009	Reply of petitioner Mohamed Ali Samantar filed. (Distributed)
Sep 30 2009	Petition GRANTED.
Oct 16 2009	The time within which to file petitioner's brief on the merits is extended to and including November 30, 2009.
Oct 16 2009	The time within which to file respondents' brief on the merits is extended to and including January 13, 2010.
Nov 30 2009	SET FOR ARGUMENT ON Wednesday, March 3, 2010.
Nov 30 2009	Joint appendix filed. (Statement of costs filed)
Nov 30 2009	Brief of petitioner Mohamed Ali Samantar filed.
Dec 7 2009	CIRCULATED.
Dec 7 2009	Brief amicus curiae of Kingdom of Saudi Arabia filed. (Distributed)
Dec 7 2009	Brief amici curiae of Former Attorneys General of the United States filed. (Distributed)
Dec 7 2009	Brief amicus curiae of American Jewish Congress filed. (Distributed)
Dec 7 2009	Brief amicus curiae of Anti-Defamation League in support of neither party filed. (Distributed)
Dec 7 2009	Brief amici curiae of Zionist Organization of America, et al. filed. (Distributed)
Dec 30 2009	Record received from U.S.C.A. for Fourth Circuit. (1 envelope)
Jan 5 2010	Record received from U.S.D.C. for the Eastern District of Virginia. (1 box) There are sealed documents in the record.
Jan 11 2010	The time within which to file respondents' brief on the merits is further extended to and including January 20, 2010.
Jan 20 2010	Brief of respondents Bashe Abdi Yousuf, et al. filed. (Distributed)
Jan 27 2010	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed

Jan 27 2010	Brief amici curiae of Retired Military Professionals filed. (Distributed)
Jan 27 2010	Brief amicus curiae of United States filed. (Distributed)
Jan 27 2010	Brief amici curiae of Academic Experts in Somali History and Current Affairs filed. (Distributed)
Jan 27 2010	Brief amici curiae of Former United States Diplomats Morton I. Abramowitz, et al. filed. (Distributed)
Jan 27 2010	Brief amici curiae of Senator Arlen Specter, et al. filed. (Distributed)
Jan 27 2010	Brief amici curiae of Professors of International Litigation and Foreign Relations Law filed. (Distributed)
Jan 27 2010	Brief amici curiae of Professors of Public International Law and Comparative Law filed. (Distributed)
Jan 27 2010	Brief amicus curiae of Foreign Minister for the Republic of Somaliland, Abdillahi Mohamed Duale filed. (Distributed)
Jan 27 2010	Brief amici curiae of Dolly Filartiga, et al. filed. (Distributed)
Jan 27 2010	Brief amici curiae of Martin Weiss, et al. filed. (Distributed)
Feb 19 2010	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Feb 19 2010	Reply of petitioner Mohamed Ali Samantar filed. (Distributed)
Mar 3 2010	Argued. For petitioner: Shay Dvoretzky, Washington, D. C. For respondents: Patricia A. Millett, Washington, D. C.; and Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

081555 JUN 18 2009

OFFICE OF THE CLERK

No. ____

IN THE

Supreme Court of the United States

MOHAMED ALI SAMANTAR,

Petitioner,

v.

BASHE ABDI YOUSUF ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a foreign state's immunity from suit under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1604, extends to an individual acting in his official capacity on behalf of a foreign state.

2. Whether an individual who is no longer an official of a foreign state at the time suit is filed retains immunity for acts taken in the individual's former capacity as an official acting on behalf of a foreign state.

PARTIES TO THE PROCEEDING

The Petitioner is Mohamed Ali Samantar. Respondents are Bashe Abdi Yousuf, Aziz Mohamed Deria (in his capacity as Personal Representative of the Estates of Mohamed Deria Ali, Mustafa Mohamed Deria, James Doe I and James Doe II), John Doe I, Jane Doe I, and John Doe II.

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PETITION FOR WRIT OF CERTIORARI

Mohamed Ali Samantar respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 552 F.3d 371. An order denying rehearing and rehearing en banc (Pet. App. 76a-77a) is unreported.

The district court's memorandum opinion granting Petitioner's motion to dismiss the second amended complaint (Pet. App. 30a-63a) is unreported but available electronically at 2007 WL 2220579. The accompanying order (Pet. App. 64a) is unreported.

JURISDICTION

Petitioner seeks review of a final decision of the court of appeals entered on January 8, 2009. Rehearing and rehearing en banc were denied on February 2, 2009. On April 23, 2009, the Chief Justice granted Petitioner's application for an extension of time to file a petition for writ of certiorari to, and including, June 18, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1330, 1602-1606, 1608 (Pet. App. 78a-95a), the Alien Tort Statute, 28 U.S.C. § 1350 (Pet. App. 96a), and the Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note (Pet. App. 97a-99a).

STATEMENT OF THE CASE

This case presents exceptionally important questions concerning the scope of federal jurisdiction over officials of foreign states. Specifically, this case presents two related questions that have divided the lower courts: first, whether FSIA immunity applies only to foreign states themselves, or also to individuals acting in an official capacity on behalf of foreign states; and second, whether such immunity for acts taken on behalf of foreign states while in office extends to individuals after they leave office.

These issues are vitally important because of the FSIA's role in ensuring comity between the United States and other nations. Indeed, if left to stand, the holding of the court below—that FSIA immunity does not extend to current or former foreign officials—threatens to eviscerate the FSIA altogether by allowing plaintiffs to obtain federal jurisdiction over virtually any action by a foreign state, simply by suing the responsible officer instead of the state itself. That result conflicts with the holdings of other circuits; contravenes the text, history, and purposes of the FSIA; and threatens to open the floodgates to claims concerning extraterritorial conduct by foreign nations.

A. District Court Proceedings

Petitioner Mohamed Ali Samantar was the First Vice President, Minister of Defense, and Prime Minister of the Democratic Republic of Somalia during the 1980s and 1990s. Pet. App. 30a. Respondents sued Samantar under the Torture Victim Protection Act of 1991 (TVPA) and the Alien Tort Statute, 28 U.S.C. § 1350, for actions taken in his official capacity on behalf of Somalia. Pet. App.

30a.

Respondents filed their complaint in November 2004 in the United States District Court for the Eastern District of Virginia. Pet. App. 43a. They alleged that the court had jurisdiction pursuant to 28 U.S.C. § 1350. The district court stayed proceedings so that the State Department could file a Statement of Interest regarding Samantar's entitlement to sovereign immunity. The court also ordered Samantar to provide monthly updates regarding the Department's position. Pet. App. 44a.

Samantar filed monthly reports to the district court indicating that the Department had the matter "still under consideration." Pet. App. 44a. After waiting two years for the Department to file a Statement of Interest, the court reinstated the case to the active docket. Pet. App. 44a. Respondents filed a second amended complaint, which Samantar moved to dismiss, arguing that the district court lacked subject matter jurisdiction because Samantar was entitled to immunity under the FSIA, 28 U.S.C. §§ 1602-1611. Pet. App. 44a-45a.

The FSIA provides the sole basis for obtaining jurisdiction over a foreign state in a civil case brought in a U.S. court. *Arg. Rep. v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-35 (1989). The FSIA immunizes "foreign state[s]" from "the jurisdiction . . . of the United States," unless the claim falls within one of the statute's specified exceptions. 28 U.S.C. §§ 1603(a), 1604. No party argued that any of the exceptions applied here. Pet. App. 46a-47a.

In interpreting the scope of the FSIA, the district court explained that, "'[a]lthough the statute is silent

on the subject, courts have construed foreign sovereign immunity to extend to an individual acting in his official capacity on behalf of a foreign state.'" Pet. App. 47a (quoting *Velasco v. Gov't of Indon.*, 370 F.3d 392, 398 (4th Cir. 2004)). Agreeing with a majority of courts of appeals, the district court held that because "'[c]laims against the individual in his official capacity are the practical equivalent of claims against the foreign state,'" FSIA immunity applies to foreign officials as well as states themselves. Pet. App. 47a (quoting *Velasco*, 370 F.3d at 399 (citing *Chuidian v. Phil. Nat'l Bank*, 912 F.2d 1095, 1101 (9th Cir. 1990))). Because Samantar was acting in his official capacity when he committed the acts alleged by Respondents, the district court concluded he was entitled to sovereign immunity and dismissed the complaint for lack of subject matter jurisdiction. Pet. App. 61a-63a.

B. Fourth Circuit Proceedings

The Fourth Circuit reversed. Pet. App. 26a. It concluded that FSIA immunity does not apply to foreign officials at all, and in any event does not apply to officials who had left office at the time that suit was filed against them. Pet. App. 20a, 25a.

In reaching this conclusion, the panel first surveyed the history of the FSIA. "When Congress enacted the FSIA in 1976," the Fourth Circuit explained, "it did so against a backdrop of foreign sovereign immunity jurisprudence spanning more than 150 years." Pet. App. 11a (citing *Amerada Hess*, 488 U.S. at 434 n.1). Before the FSIA was enacted, courts routinely "'deferred to the decisions of the political branches . . . on whether to take jurisdiction over actions against foreign sovereigns and their

instrumentalities.'" Pet. App. 12a (quoting *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 486 (1983)). While the State Department previously recommended immunity for almost every sovereign, in 1952, the Department changed this policy and instead "adopted a restrictive theory of sovereign immunity." Pet. App. 12a (citing *Amerada Hess*, 488 U.S. at 434 n.1). "One consequence of [this] restrictive theory . . . was that 'foreign nations often placed diplomatic pressure on the State Department,' which still bore the primary 'responsibility for deciding questions of sovereign immunity.'" Pet. App. 12a (quoting *Verlinden*, 461 U.S. at 487). Congress enacted the FSIA in 1976 to "shift[] responsibility for deciding questions of foreign sovereign immunity from the Executive Branch to the Judicial Branch 'in order to free the Government from the case-by-case diplomatic pressures, [and] to clarify the governing standards.'" Pet. App. 12a (quoting *Verlinden*, 461 U.S. at 488).

But the panel noted that the statute includes "no explicit mention of individuals or natural persons, [so] it is not readily apparent that Congress intended the FSIA to apply to individuals." Pet. App. 14a. The panel acknowledged "the majority view clearly is that the FSIA applies to individual officials of a foreign state." Pet. App. 14a (citing *Chuidian*, 912 F.2d at 1099-1103; *In re Terrorist Attacks on Sept. 11, 2001 (Fed. Ins. Co.)*, 538 F.3d 71, 83 (2d Cir. 2008); *Keller v. Cent. Bank of Nig.*, 277 F.3d 811, 815-16 (6th Cir. 2002); *Byrd v. Corporacion Forestal y Industrial de Olancho*, 182 F.3d 380, 388-89 (5th Cir. 1999); *El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 671 (D.C. Cir. 1996)). It nonetheless followed the Seventh Circuit's contrary view, *Enahoro v. Abubakar*, 408

F.3d 877, 881-82 (7th Cir. 2005), and held that FSIA immunity does not extend to individuals. Pet. App. 17a-20a.

Noting that the FSIA immunizes both a "foreign state" and an "agency or instrumentality" of a state, the panel explained that an "'agency or instrumentality . . . ' is defined as an 'entity' that 'is a separate legal person, corporate or otherwise,'" Pet. App. 17a (quoting 28 U.S.C. § 1603(b)(1)), and this phrase is "laden with corporate connotations." Pet. App. 17a. "'If Congress meant to include individuals acting in [their] official capacity in the scope of the FSIA, it would have done so in clear and unmistakable terms.'" Pet. App. 18a (quoting *Enahoro*, 408 F.3d at 881-82). Because, in the panel's view, FSIA immunity does not apply to individuals, the panel held that "the district court erred by concluding that Samantar is shielded from suit by the FSIA." Pet. App. 20a.

The panel majority further held that, even if the FSIA applies to individuals, it does not apply to *former* government officials like Samantar. Pet. App. 21a. The panel rested this conclusion on this Court's decision in *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003). "In *Dole Food*, the Dead Sea Companies corporation claimed immunity under the FSIA as an instrumentality of the State of Israel, which owned a majority share in parent companies of the [corporation] at the time of the events being litigated[,] but not at the time of suit." Pet. App. 21a. Under 28 U.S.C. § 1603(b)(2), an "'agency or instrumentality of a foreign state' means any entity . . . which is an organ of a foreign state or political subdivision thereof, or a majority of whose

shares or other ownership interest *is* owned by a foreign state or political subdivision" (emphasis added). This Court held that "the plain text of this provision, because it is expressed in the present tense, requires that [the majority-ownership] status be determined at the time suit is filed." *Dole Food*, 538 U.S. at 478.

Relying on *Dole Food*, the panel concluded that an *individual's* status as an agency or instrumentality must similarly be determined at the time suit is filed. Pet. App. 22a-23a. The Fourth Circuit reasoned that, "like the 'ownership interest' clause at issue in *Dole Food*, the clause immediately preceding it is also expressed in the present tense. Under section 1603(b)(2), an entity can be an 'agency or instrumentality of a foreign state' only if that entity '*is* an organ of a foreign state or political subdivision thereof.'" Pet. App. 22a.

Additionally, the panel decided that declining to apply the FSIA to former government officials does not undermine the Act's purpose, "which has never been to permit foreign states and their instrumentalities to shape their conduct in reliance on the promise of future immunity from suit, but instead aims to give foreign states . . . some *present* protection from the inconvenience of suit as a gesture of comity." Pet. App. 24a (quoting *Rep. of Austria v. Altmann*, 541 U.S. 677, 696 (2004)) (internal quotation marks omitted).

The panel remanded the case to the district court for further proceedings, including on the question whether Samantar was entitled to common-law immunity. Pet. App. 25a-26a.

Judge Duncan concurred in part, explaining that

the panel's "conclusion that the FSIA does not apply to individuals is sufficient to resolve the case before us." Therefore, Judge Duncan did not join the panel "in reaching the question of whether and how [*Dole Food*] would apply to individual foreign officers." Pet. App. 27a.

Samantar filed a timely petition for rehearing and rehearing en banc, which the Fourth Circuit denied on February 2, 2009. Pet. App. 77a.

REASONS FOR GRANTING THE WRIT

I. THE COURTS OF APPEALS ARE DIVIDED ON WHETHER FSIA IMMUNITY APPLIES TO INDIVIDUALS ACTING IN AN OFFICIAL CAPACITY ON BEHALF OF A FOREIGN STATE

The courts of appeals are divided on whether immunity under the Foreign Sovereign Immunities Act extends to foreign officials acting in an official capacity. The Second, Fifth, Sixth, Ninth, and D.C. Circuits have held that FSIA immunity extends to foreign officials. *See In re Terrorist Attacks on Sept. 11, 2001* (*Fed. Ins. Co.*), 538 F.3d 71, 85 (2d Cir. 2008); *Byrd v. Corporacion Forestal y Industrial de Olancho*, 182 F.3d 380, 388 (5th Cir. 1999); *Keller v. Cent. Bank of Nig.*, 277 F.3d 811, 815 (6th Cir. 2002); *Chuidian v. Phil. Nat'l Bank*, 912 F.2d 1095, 1103 (9th Cir. 1990); *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1027 (D.C. Cir. 1997). In contrast, the Fourth Circuit and the Seventh Circuit have held that foreign officials are not entitled to FSIA immunity. *See* Pet. App. 17a-20a; *Enahoro v. Abubakar*, 408 F.3d 877, 881-82 (7th Cir. 2005).

The FSIA precludes claims against a "foreign

state" unless those claims fall within a specific FSIA exception. *See* 28 U.S.C. § 1604; *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993). The FSIA defines "foreign state" as follows:

> (a) "foreign state" . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
> (b) An "agency or instrumentality of a foreign state" means any entity—
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603.

In the present case, the Fourth Circuit joined the Seventh Circuit in holding that the FSIA does not apply to individuals sued in their official capacity. The panel explained that § 1603(b)'s definition of "agency or instrumentality" is "laden with corporate connotations." Pet. App. 17a. "'Given that the phrase 'corporate or otherwise' follows on the heels of 'separate legal person,' we are convinced that the

latter phrase refers to a legal fiction—a business entity which is a legal person.'" Pet. App. 18a (quoting *Enahoro*, 408 F.3d at 881). The court further reasoned that "'[i]f Congress meant to include individuals acting in the official capacity in the scope of the FSIA, it would have done so in clear and unmistakable terms.'" Pet. App. 18a (quoting *Enahoro*, 408 F.3d at 881-82).

In contrast, the Second, Fifth, Sixth, Ninth, and D.C. Circuits have explained convincingly why the Fourth Circuit's analysis is inconsistent with the text, history, and purposes of the FSIA. First, an "agency or instrumentality" of a foreign state is readily construed to include "any thing or person through which action is accomplished," including individual officers of the state. *Fed. Ins. Co.*, 538 F.3d at 83; *see also Keller*, 277 F.3d at 815-16; *Byrd*, 182 F.3d at 388-89; *El-Fadl*, 75 F.3d at 671. Although § 1603(b)'s definition of "agency or instrumentality" "may not explicitly include individuals . . . neither does it expressly exclude them. . . . Nowhere in the text or legislative history does Congress state that individuals are *not* encompassed within the section 1603(b) definition . . . ." *Chuidian*, 912 F.2d at 1101; *see also Fed. Ins. Co.*, 538 F.3d at 83 (same).

Second, whether or not the phrase "agency or instrumentality" encompasses natural persons, FSIA immunity extends to foreign officials because "[i]t is generally recognized that a suit against an individual acting in his official capacity is the practical equivalent of a suit against the sovereign directly." *Chuidian*, 912 F.2d at 1101-02 (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978)).

Because an individual's official acts are, by definition, acts of the "state," it is perfectly natural to read the FSIA's grant of immunity to "foreign state[s]" as encompassing those official acts by individuals. 28 U.S.C. § 1604. Furthermore, in defining the term "foreign state," the FSIA merely indicates that this term "*includes* an agency or instrumentality of a foreign state." *Id.* § 1603(a) (emphasis added). In this context, "the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle." *Fed. Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941).

Third, under the common-law principles that the FSIA codified, *see Belhas v. Ya'alon*, 515 F.3d 1279, 1285 (D.C. Cir. 2008), individuals who were sued in their official capacity were eligible for sovereign immunity. *See Fed. Ins. Co.*, 538 F.3d at 83 (citing *Chuidian*, 912 F.2d at 1101); *see also Chuidian*, 912 F.2d at 1099-1100 (common-law immunity extended to "'any . . . public minister, official, or agent of the state with respect to acts performed in his official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state[.]'" (quoting Restatement (Second) of Foreign Relations Law § 66 (1965))). "If in fact the Act does not include such officials, the Act contains a substantial unannounced departure from prior common law." *Chuidian*, 912 F.2d at 1101; *see also Matar v. Dichter*, 563 F.3d 9, 13 (2d Cir. 2009) (explaining that "[t]he FSIA is a statute that invade[d] the common law and accordingly must be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident") (citation and internal

quotation marks omitted); *Fed. Ins. Co.*, 538 F.3d at 83 (same).

Fourth, such a result would be contrary to the settled precept that statutes derogating sovereign immunity are strictly construed. *See Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999) (explaining that this Court has "frequently held . . . that a waiver of sovereign immunity is to be strictly construed, in terms of its scope, in favor of the sovereign"); 3 Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutory Construction* § 62:1 (7th ed. 2008) ("Even where the government is expressly included in a statute, the statute is kept within the narrowest possible limits to preserve sovereignty.").

Finally, the Fourth Circuit ignored amendments to the so-called terrorism exception of the FSIA that show that "Congress consider[s] individuals and government officers to be within the scope of the FSIA." *Fed. Ins. Co.*, 538 F.3d at 84. When Congress added the terrorism exception to the FSIA, it expressly referred to officials, employees, and agents. 28 U.S.C. § 1605(a)(7) (repealed 2008; pertinent language recodified at 28 U.S.C. § 1605A(a)(1)) (abrogating preexisting immunity in connection with, *inter alia*, the "provision of material support or resources . . . *by an official, employee, or agent* of [a] foreign state while acting within the scope of his or her office, employment, or agency" (emphasis added)); *id.* § 1605A(c) (creating private right of action against a "foreign state that is or was a state sponsor of terrorism . . . , and any *official, employee, or agent* of that foreign state while acting within the scope of his or her office, employment, or agency" (emphasis

added)). The reference by these amendments to officials, employees, and agents reinforces the conclusion that the FSIA applies to individuals. "If these individuals were not otherwise immune from suit pursuant to the FSIA, these provisions" creating an exception to individual immunity in limited circumstances "would be entirely superfluous." *Fed. Ins. Co.*, 538 F.3d at 84.

II. THE FOURTH CIRCUIT'S DECISION CREATES A CONFLICT OVER WHETHER FSIA IMMUNITY APPLIES TO FORMER GOVERNMENT OFFICIALS

The Fourth Circuit's holding that FSIA immunity does not apply to *former* officials (whether or not it extends to present foreign officials) conflicts with the D.C. Circuit's decision in *Belhas v. Ya'alon*, 515 F.3d 1279, 1285-86 (D.C. Cir. 2008). *See also* Brief for the United States as Amicus Curiae at 9-10, *Fed. Ins. Co. v. Kingdom of Saudi Arabia*, No. 08-640 (U.S. June 1, 2009), 2009 WL 1539068 (Solicitor General's Br.) (describing circuit split on this issue); *Fed. Ins. Co.*, 349 F. Supp. 2d 765, 789 (S.D.N.Y. 2005), *aff'd*, 538 F.3d 71 (2d Cir. 2008).

As described above, in concluding that FSIA immunity does not extend to former officials, the Fourth Circuit relied on this Court's decision in *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), which held that a *corporation*'s status as an "agency or instrumentality" of a foreign state must "be determined at the time suit is filed." *Id.* at 478. Analogizing an individual to a corporation, the Fourth Circuit concluded that an individual's status as a foreign official must likewise be determined at the time of suit.

The D.C. Circuit, in contrast, rejected this argument and concluded that FSIA immunity encompasses both current and former government officials. *See Belhas*, 515 F.3d at 1284-86. This conclusion is consistent with the FSIA's text, history, and purpose for several reasons. First, a former official is entitled to immunity under the FSIA without regard to the statute's definition of an "agency or instrumentality." As explained above, a suit against a foreign government officer in his official capacity is equivalent to a suit against the state itself. *Chuidian*, 912 F.2d at 1101; *see also Belhas*, 515 F.3d at 1286 ("Every act committed by a sovereign government is carried out by its officials and agents."). Thus, the statutory immunity for the "foreign state" itself shields government officers from liability for actions in their official capacity, *see* 28 U.S.C. § 1604, and *Dole Food* is inapplicable.

Second, *Dole Food* is inapposite because it only analyzed the majority-ownership prong of 28 U.S.C. § 1603(b)(2) and "never dealt with the acts of a government official" under the "organ of a foreign state" prong. *See Belhas*, 515 F.3d at 1286; *see also id.* at 1291 (Williams, J., concurring) (describing the differences between the majority-ownership and organ of a foreign state prongs of § 1603(b)(2)). "The status of a corporation at one time owned by a foreign state and an individual who was at one time an official of such a state are hardly the same." *Id.* at 1286 (majority opinion). In particular, "[t]he corporation and the state have at all times been entities wholly separate and distinguishable from each other and able to act without the presence or even existence of the other." *Id.* The FSIA extends immunity to such corporations that are currently

majority-owned because lawsuits against them have a direct and immediate impact on the foreign state's treasury. But the "impact on a foreign state of our exercising jurisdiction over a corporation it merely owned in the past is at best attenuated." *Id.* at 1291 (Williams, J., concurring). In fact, as soon as the corporation's ownership status changes, "even by the foreign state's ownership dropping to fractionally less than a majority of shares," it is immediately transformed into an ordinary private actor, entitled to no sovereign immunity. *Id.* (citing *Dole Food*, 538 U.S. at 478-80).

No similar transformation occurs when an official leaves office. "Every act committed by a sovereign government is carried out by its officials and agents. . . . [I]ndividual officials or agents must act as instrumentalities for anything actually to be done." *Id.* at 1286 (majority opinion). Unlike an act of a formerly-owned corporation, an act by an officer is readily attributable to the state itself. Lawsuits regarding such official acts directly impact the state, regardless of whether the individual continues to employed by the state. Thus, "an individual's . . . lack of immunity for actions undertaken on the state's behalf would have a significant impact on the foreign state and the United States' relations with that state." *Id.* at 1291 (Williams, J., concurring). "To allow the resignation of an official involved in the adoption of policies underlying a decision or in the implementation of such decision to repeal his immunity would destroy, not enhance . . . comity." *Id.* at 1286 (majority opinion).

Finally, holding that the FSIA only applies to

current officials "would be a dramatic departure from the common law of foreign sovereign immunity," which the FSIA codified. *Id.* at 1285. At the time the FSIA was enacted, the common law "made no distinction between the time of the commission of official acts and the time of suit." *Id.* "[I]t is unreasonable to assume that in enacting the FSIA, Congress intended to make such sweeping and counterintuitive changes to foreign sovereign immunity with the simple use of the word 'is.'" *Id.*

The Fourth Circuit's erroneous decision thus conflicts with the decision of the D.C. Circuit on the same issue, and warrants this Court's review.

III. THIS CASE PRESENTS A COMPELLING VEHICLE TO RESOLVE IMPORTANT QUESTIONS CONCERNING THE SCOPE OF FSIA IMMUNITY

This case presents a compelling vehicle to decide these two important and interrelated questions about the FSIA that have divided the lower courts.

A. The Important Issues Raised By This Case Merit This Court's Review

The issues raised by this case merit the Court's review because the Fourth Circuit's decision, if allowed to stand, will undermine the comity between the United States and other sovereigns that the FSIA was meant to ensure. *See Dole Food*, 538 U.S. at 479. "Recognizing the potential sensitivity of actions against foreign states, the FSIA aimed to facilitate and depoliticize litigation against foreign states and to minimize irritations in foreign relations arising out of such litigation." *Fed. Ins. Co.*, 538 F.3d at 82 (citation and internal quotation marks omitted).

Even prior to the Fourth Circuit's decision, the number of suits brought in United States courts against foreign officials had already increased substantially in recent years. From 1976 to 1989, federal district courts decided nineteen cases that were filed against foreign government officials in U.S. courts. Between 1990 and 1999, this number increased to forty-six. Between 2000 and the present, ninety-nine such suits have been decided.[1]

The Fourth Circuit's decision will open the floodgates to even more litigation against foreign officials. As the Ninth Circuit has explained, if plaintiffs could obtain judicial review of virtually any act by any foreign government simply "by [the] artful pleading" of suing the responsible officer instead of the foreign state itself, the statute would become "optional." *Chuidian*, 912 F.2d at 1102. "Such a result would amount to a blanket abrogation of foreign sovereign immunity by allowing litigants to accomplish indirectly what the Act barred them from doing directly." *Id.* Just as allowing official-capacity suits against state officials for prospective relief under *Ex parte Young*, 209 U.S. 123, 159-60 (1908), has led to a myriad of injunctive suits against state actors, notwithstanding the state's Eleventh Amendment immunity, so too will the Fourth Circuit's authorization of suits against officials swallow the "rule" prohibiting actions against foreign states. These suits will "place an enormous strain not only upon our courts but, more to the immediate point, upon our country's diplomatic relations with

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[1] These numbers are based on a Westlaw search run on June 17, 2009.

any number of foreign nations." *Belhas*, 515 F.3d at 1287 (citation and internal quotation marks omitted).

In fact, the Fourth Circuit's decision effectively nullifies the holdings of other circuits that have properly construed the FSIA to immunize foreign officials from suit, because courts in the Fourth Circuit potentially have jurisdiction over virtually all actions brought in the United States against foreign officials. The statutes under which foreign defendants are typically sued in U.S. courts do not require plaintiffs to comply with any one state's long-arm statute. *See, e.g.*, *Mwani v. bin Laden*, 417 F.3d 1, 10-11 (D.C. Cir. 2005) (concluding that Federal Rule of Civil Procedure 4(k)(2) effectively served as a nationwide long-arm statute that "eliminate[d] the need to employ the forum state's long-arm statute" in an action brought under the Alien Tort Statute); 18 U.S.C. § 2334(a) (providing for nationwide service of process under the Antiterrorism Act); 18 U.S.C. § 1965 (providing for nationwide service of process under RICO). Moreover, in this context, whether the exercise of personal jurisdiction comports with due process depends "on whether [the] defendant has sufficient contacts with the United States as a whole," not merely with the forum state. *Mwani*, 417 F.3d at 11; *see also, e.g.*, *Heinemann v. Kennedy*, No. 2:07CV91, 2008 WL 649061, at *5 (N.D. W. Va. Mar. 10, 2008) (explaining that "in RICO cases the Fourth Circuit has held that the proper inquiry is whether a defendant has sufficient minimum contacts with the United States, not with any particular state") (citing *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 626-27 (4th Cir. 1997)). Thus, since virtually all suits against foreign officials can be brought in the Fourth Circuit, the decision below effectively overrules the

five circuit court decisions precluding such suits.

The Fourth Circuit's erroneous decision thus deepens circuit splits on important and recurring issues, and warrants this Court's immediate review.

B. The Solicitor General's Arguments In *Federal Insurance* Do Not Support Denying Review Here

The Solicitor General's Supreme Court amicus brief in *Federal Insurance Co. v. Kingdom of Saudi Arabia*, No. 08-640 (petition filed Nov. 12, 2008), nonetheless makes the remarkable contention that a judicial misinterpretation of the FSIA is inconsequential because the statute and the common law are largely coextensive on the question whether FSIA immunity applies to individuals. *See* Solicitor General's Br. 8-9 (citing *Matar*, 563 F.3d at 13). That argument is flawed even where the scope of statutory and common-law protections are identical, and certainly has no application where, as here, there is a conceded potential divergence between the statute and the common law.

As an initial matter, even the Solicitor General acknowledges that the common law and the FSIA may diverge concerning whether a foreign official loses immunity for official acts upon leaving office. *See* Solicitor General's Br. 9-10 (recognizing the circuit split between the Fourth and D.C. Circuits and explaining that "application of the FSIA framework raises the problematic prospect that, under *Dole Food*, foreign officials could lose immunity upon leaving office"). The purported overlap between the FSIA and the common law thus provides no basis for denying review of the question raised by this case (and absent from *Federal Insurance*) concerning the

immunity of former officials.

More fundamentally, the Solicitor General's counterintuitive suggestion that the FSIA may be misinterpreted without consequences because individual defendants may be entitled to common-law immunity would nullify the FSIA and its purposes altogether. In enacting the FSIA, Congress not only defined the scope of foreign sovereign immunity, but also obviated the need for Executive Branch discretion in making immunity determinations. In doing so, Congress sought to ensure a uniform, evenhanded approach to immunity determinations unencumbered by the shifting pressures of international politics, and to free the Executive from making sensitive, case-by-case immunity decisions.

Specifically, before the FSIA, a foreign defendant typically requested a finding of immunity from the State Department, and the Department conveyed its conclusions to the court by filing a "suggestion." In practice, "courts treated such 'suggestions' as binding determinations, and would invoke or deny immunity based upon the decision of the State Department." *Chuidian*, 912 F.2d at 1100; *accord Rep. of Iraq v. Beaty*, Nos. 07-1090, 08-539, 2009 WL 1576569, at *6 (U.S. June 8, 2009) ("[T]he granting or denial of [sovereign] immunity was historically the case-by-case prerogative of the Executive Branch."). "During the 1970s, Congress became concerned that the law of sovereign immunity under [this approach] was leaving immunity decisions subject to diplomatic pressures rather than to the rule of law." *Chuidian*, 912 F.2d at 1100. "'From the standpoint of the private litigant, considerable uncertainty result[ed]. A private party who deals with a foreign government

entity cannot be certain that his legal dispute with a foreign sovereign will not be decided on the basis of nonlegal considerations through the foreign government's intercession with the Department of State.'" *Id.* (quoting H.R. Rep. No. 94-1487, at 9 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6607).

As a result of this ad hoc decision-making process dominated by political considerations and favoritism, Congress enacted the FSIA precisely to "remove the role of the State Department in determining immunity." *Id.*; *accord Beaty*, 2009 WL 1576569, at *6 (Congress "[had] taken upon itself in the FSIA to 'free the Government' from the diplomatic pressures engendered by the case-by-case approach") (citation omitted). The Solicitor General's argument that the source of immunity is irrelevant contravenes the neutral framework enacted by Congress and would reintroduce precisely the sort of political pressures and whims that Congress sought to eliminate from immunity determinations.

The Solicitor General's argument is particularly flawed where, as here, the FSIA allegedly provides different protection than the common law. The Solicitor General's notion that the judiciary can simply provide common-law immunity in the face of finding that a statute provides no immunity (or vice versa) is at odds with the settled precept that "general and comprehensive legislation . . . indicates a legislative intent that the statute should totally supersede and replace the common law dealing with the subject matter." 2B *Sutherland Statutory Construction* § 50:5. Indeed, courts generally presume that federal statutes displace federal common law. *See, e.g., City of Milwaukee v. Illinois*,

451 U.S. 304, 317 (1981) ("[I]n cases such as the present 'we start with the assumption' that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law.") (citation omitted).[2]

At a minimum, if the FSIA does not provide immunity in a particular context, this is at least strong evidence that immunity should not be granted, and that a suggestion of immunity by the Executive Branch would not be entitled to deference. *See generally Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring) (explaining that "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb," and that "[c]ourts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject"). The Solicitor General's contrary argument would render the statute a nullity.

Indeed, the Solicitor General's suggestion that the common law survives unaffected by the statute—and

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[2] This Court has concluded, for example, that because the Federal Water Pollution Control Act Amendments "occupied the field through the establishment of a comprehensive regulatory program," the Act displaced federal common-law claims for abatement of a nuisance caused by interstate water pollution. *See City of Milwaukee*, 451 U.S. at 307-08, 317. Similarly, the enactment of the Federal Tort Claims Act displaced the Government's entitlement to sovereign immunity in prison litigation cases, *see United States v. Muniz*, 374 U.S. 150, 158 (1963), and § 1983 is the exclusive federal damages remedy for violations of federal constitutional rights, displacing any *Bivens*-type action implied directly from the Fourteenth Amendment, *see Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 734-35 (1989).

that a misinterpretation of the FSIA can therefore be "cured" by finding common-law immunity—has itself divided the lower courts. *Compare Chuidian*, 912 F.2d at 1102 (concluding that the FSIA cannot "reasonably be interpreted to leave intact the pre-1976 common law with respect to foreign officials"), *with Matar*, 563 F.3d at 14 ("[E]ven if . . . a former foreign official . . . is not categorically eligible for immunity under the FSIA . . . he is nevertheless immune from suit under common-law principles that pre-date, and survive, the enactment of that statute.").

In sum, the Solicitor General's notion that divided and erroneous interpretations of the FSIA are unworthy of review, because often the same immunity can result from the very Executive Branch discretionary actions that the Act was intended to obviate, nullifies the FSIA's effort at uniformity and is necessarily based on a controversial view of the interrelationship of the common law and statutory immunity. The Solicitor General's arguments in *Federal Insurance* provide no basis for denying certiorari here.

C. This Case Is A Better Vehicle Than *Federal Insurance* To Address The Scope Of Individual Immunity Under The FSIA

This case presents a better vehicle than *Federal Insurance* to address the scope of immunity afforded to foreign officials under the FSIA.

While both this case and *Federal Insurance* squarely present the threshold issue of whether the FSIA applies to individuals who are foreign officials at the time that suit is brought, this case presents the additional issue of whether FSIA immunity

applies to *former* officials. As noted above, even the Solicitor General acknowledges that the courts of appeals are divided—and the common law and the FSIA may diverge—on the critical question of whether a foreign official loses immunity for official acts upon leaving office. *See* Solicitor General's Br. 9-10 (recognizing the circuit split between the Fourth and D.C. Circuits and explaining that "application of the FSIA framework raises the problematic prospect that, under *Dole Food*, foreign officials could lose immunity upon leaving office").[3]

The present case is also a better vehicle for resolving the question of whether FSIA immunity applies to present foreign officials because, however this Court resolves that issue in *Federal Insurance*, it will likely not affect the outcome in that case. The Second Circuit held that the district court lacked personal jurisdiction over the individual defendants sued in their personal capacities in *Federal Insurance*. Specifically, the Second Circuit reasoned that the defendants' alleged acts of donating money to a foreign charity purportedly knowing that the money would be diverted to al Qaeda do not constitute conduct expressly aimed at the United States or U.S. residents sufficient to support the exercise of personal jurisdiction. *Fed. Ins. Co.*, 538 F.3d at 94-95. As the Solicitor General explains, the

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[3] The Solicitor General nonetheless suggests that this "potential anomaly so far has not led to untoward results." Solicitor General's Br. 9. But the fact that some courts have avoided the issue in the past does not justify denying review in the present case, where even the Solicitor General concedes there is a conflict between the Fourth Circuit and the D.C. Circuit on this issue.

Second Circuit correctly decided that issue, and in any event, "the court's case-specific holding[] on this score do[es] not warrant review by this Court." Solicitor General's Br. 20. Because the same alleged acts form the basis for both the personal-capacity and the official-capacity claims against the defendants in *Federal Insurance*, the Second Circuit would likely hold that personal jurisdiction is lacking over the defendants in their official capacities if squarely presented with the issue. Thus, the complaint in *Federal Insurance* would likely be dismissed *regardless* of this Court's holding concerning individual immunity under the FSIA. Here, in contrast, the only questions presented are certworthy issues under the FSIA, and those issues may well be outcome-determinative of jurisdiction.[4]

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[4] The Petitioners in *Federal Insurance* also raise another issue regarding the scope of the domestic tort exception. As the Solicitor General argues, that question does not merit this Court's review either. The Second Circuit's "conclusion that [the *Federal Insurance*] petitioners had not overcome Saudi Arabia's immunity was correct" and no circuit split exists on this question. Solicitor General's Br. 17-18.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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June 18, 2009

APPENDIX

United States Court of Appeals,
Fourth Circuit.
Bashe Abdi YOUSUF; Officer John Doe 1; Jane Doe 1; John Doe 2; John Doe 3; John Doe 4; Aziz Deria, Plaintiffs-Appellants,
v.
Mohamed Ali SAMANTAR, Defendant-Appellee.

Allard K. Lowenstein International Human Rights Clinic, Yale Law School; American Friends Service Committee; Boston Center for Refugee Health and Human Rights; Consistent Life; Earthrights International; Dolly Filartiga; Florida Center for Survivors of Torture; Global Lawyers and Physicians; Human Rights First; Human Rights Watch; Maryknoll Office of Global Concerns; Muslim Public Affairs Council; Sister Dianna Ortiz; Program for Survivors of Torture and Severe Trauma; Program for Torture Victims; Rocky Mountain Survivors Center; Survivors of Torture, International; The Shalom Center; Torture Abolition and Survivors Support Coalition International; World Organization for Human Rights USA; International Rights Advocates; International Human Rights Clinic, Human Rights Program of Harvard Law School; United States Member of Congress and Law Professors, Amici Supporting Appellants.
No. 07-1893.

Argued: Sept. 23, 2008.
Decided: Jan. 8, 2009.

ARGUED: Tara M. Lee, Cooley, Godward & Kronish, L.L.P., Reston, Virginia, for Appellants. Frederick B. Goldberg, Bethesda, Maryland, for Appellee.

ON BRIEF: Robert R. Vieth, Sherron N. Thomas, Cooley, Godward & Kronish, L.L.P., Reston, Virginia; Maureen P. Alger, Cooley, Godward & Kronish, L.L.P., Palo Alto, California; Pamela Merchant, Moira Feeney, Center for Justice & Accountability, San Francisco, California, for Appellants. Julian H. Spirer, Spirer & Goldberg, P.C., Bethesda, Maryland, for Appellee. Tyler Giannini, Harvard Law School, International Human Rights Clinic, Human Rights Program, Cambridge, Massachusetts, for Torture Survivors Support Organizations, Human Rights Organizations, Religious Organizations and Torture Survivors and Their Family Members, Amici Supporting Appellants. Deena R. Hurwitz, Germaine S. Dunn, Kerry M. Shapleigh, University Of Virginia School of Law, Charlottesville, Virginia, for United States Member of Congress and Law Professors, Amici Supporting Appellants.

Before TRAXLER, KING, and DUNCAN, Circuit Judges.

Reversed and remanded by published opinion. Judge TRAXLER wrote the opinion, in which Judge KING joined. Judge DUNCAN wrote a separate concurring opinion.

OPINION

TRAXLER, Circuit Judge:

Plaintiffs, all of whom are natives of Somalia, brought this action under the Torture Victim Protection Act of 1991, *see* Pub.L. 102-256, 106 Stat. 73 (1992), and the Alien Tort Statute, *see* 28 U.S.C. § 1350, seeking to impose liability against and recover damages from Defendant Mohamed Ali Samantar for alleged acts of torture and human

rights violations committed against them by government agents commanded by Samantar during the regime of Mohamed Siad Barre. The district court concluded that Samantar enjoys immunity under the Foreign Sovereign Immunities Act ("FSIA"), *see* 28 U.S.C. §§ 1602-1611, and dismissed the action for lack of subject matter jurisdiction.

For the reasons set forth below, we conclude that the FSIA does not apply to individuals and, as a result, Samantar is not entitled to immunity under the FSIA. Because the FSIA does not apply in this case, it consequently does not deprive the district court of jurisdiction. Accordingly, we reverse the ruling of the district court dismissing for lack of subject matter jurisdiction under the FSIA and remand this action for further proceedings.

I.

A.

Plaintiffs all claim to have suffered torture or other abuses in violation of international law at the hands of Somali soldiers or other government agents under the general command of Samantar. Samantar became a high-ranking government official in Somalia as a result of his participation in a socialist coup staged by General Mohamed Barre in 1969. According to plaintiffs, "[p]ower was assumed by the Supreme Revolutionary Council (SRC), which consisted primarily of the Army Officers who had supported and participated in the coup, including Defendant Samantar." J.A. 32. In order to squelch potential opposition to its seizure of power, the SRC outlawed political parties and any organization not sanctioned by the government, and the SRC "systematically favored its own clans and oppressed

other clans." J.A. 32. In particular, plaintiffs allege that the military government brutally oppressed the generally prosperous and well-educated Isaaq clan, which the government viewed as a threat, and imposed measures intended to harm the clan politically and economically.

Beginning in the late 1970s, opposition to the Barre regime developed within the disfavored clans and grew among the general citizenry following Somalia's unsuccessful war against Ethiopia over the Ogaden territory. The military leadership reacted by imposing harsh control measures against government opponents, including the alleged commission of "numerous atrocities against ordinary citizens" in order to "terrorize the civilian population and to deter it from supporting the growing opposition movements." J.A. 33. Plaintiffs allege that government intelligence agencies, including the National Security Service ("NSS") and the military police, engaged in "the widespread and systematic use of torture, arbitrary detention and extrajudicial killing against the civilian population of Somalia." J.A. 33.

Three of the plaintiffs allege that they were personally subjected to this brutality. Plaintiff Bashe Abdi Yousuf, a member of the Isaaq clan, claims that NSS agents, suspecting him of anti-government activities, abducted him and tortured him by various methods, including electric shock and "the Mig," a means of torture whereby Yousuf's hands and feet were bound together in the air behind his back and a heavy rock was placed on his back. Plaintiff Jane Doe, also an Isaaq clan member, alleges that in 1985, she was abducted from her family home in Hargeisa

by NSS agents, repeatedly tortured and raped, beaten to the point that she could not walk, and placed in solitary confinement for three and a half years. Finally, plaintiff John Doe II, also born into the Isaaq clan, alleges that, although he was a non-commissioned officer in the Somali National Army, he was arrested in 1988 with other Somali soldiers who were Isaaq clansmen and then shot during a mass execution. Doe survived his non-fatal wound by hiding under a pile of bodies.

The remaining plaintiffs are pursuing claims as personal representatives of the estates of family members allegedly killed by government agents. Plaintiff Aziz Mohamed Deria alleges that his father and brother were tortured and killed by soldiers based on his family's affiliation with the Isaaq clan. Plaintiff John Doe I, an Isaaq clansman, asserts that his two brothers were abducted by government forces while tending the family's livestock and then executed.

Plaintiffs do not allege that Samantar personally committed these atrocities or that he was directly involved, but they claim that the responsible government agents operated against them and other civilians "with the tacit approval and permission of the Armed Forces and their commander, Defendant Samantar," J.A. 33, who served as Somalia's Minister of Defense from January 1980 to December 1986, and as Prime Minister from January 1987 to September 1990. Regardless of whether the alleged acts occurred during Samantar's tenure as Prime Minister or his stint as Minister of Defense, plaintiffs claim Samantar is subject to liability because, in either

capacity, he knew or should have known about this conduct and, essentially, gave tacit approval for it.

Ultimately, any oppression of Somali civilians ended in January 1991, when the Barre regime collapsed and high ranking officials, including Samantar, fled Somalia. Samantar ended up in Virginia, where the plaintiffs, some of whom apparently are naturalized American citizens, found him.

B.

Plaintiffs brought this action for damages under the auspices of two statutes. First, plaintiffs seek to impose liability against Samantar under the Alien Tort Statute ("ATS"). The ATS grants district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The ATS was enacted as part of the Judiciary Act of 1789 and has been on the books, in essentially its current form, ever since. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 712-13 & n. 10, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004). Fundamentally, "the ATS is a jurisdictional statute [that] creat[ed] no new causes of action"; rather, it was "enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time." *Id.* at 724, 124 S.Ct. 2739.[1]

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[1] According to the plain statutory language, one precondition for subject-matter jurisdiction to be conferred under the ATS is that suit be filed by an *alien*, not a citizen. *See Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir.1995) ("[The ATS] confers federal subject-

Plaintiffs claim that the torture they suffered and the extrajudicial killings of their family members constituted violations of international law. Plaintiffs contend that Samantar is liable for these acts, both in his capacity as Minister of Defense and as Prime Minister of Somalia, because he "possessed and exercised command and effective control over the Armed Forces of Somalia" and that he "knew or should have known that his subordinates had committed, were committing, or were about to commit extrajudicial killings, . . . torture, crimes against humanity, war crimes, cruel, inhuman, or degrading treatment." J.A. 45.

Plaintiffs also contend that Samantar is liable under the Torture Victim Protection Act of 1991 ("TVPA"). The TVPA provides that "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture" or "subjects an individual to extrajudicial killing," is liable in a civil action for damages to the victim or the victim's legal representative. § 2(a), 106 Stat. 73. "Though the Torture Victim Act creates a cause of action for official torture, this statute, unlike the Alien Tort Act, is not itself a jurisdictional statute." *Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir. 1995) (concluding that the TVPA "permits the appellants to pursue their claims of official torture under the jurisdiction conferred by the Alien Tort Act

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matter jurisdiction when the following three conditions are satisfied: (1) an alien sues (2) for a tort (3) committed in violation of the law of nations (*i.e.*, international law).") To the extent that any of the claims under the ATS are being asserted by plaintiffs who are American citizens, federal subject-matter jurisdiction may be lacking. This issue should be explored upon remand.

and also under the general federal question jurisdiction of section 1331"); *see Arce v. Garcia*, 434 F.3d 1254, 1257 n. 8 (11th Cir.2006) (assuming that § 1331, not the ATS, provides the jurisdictional basis for the TVPA).

C.

Samantar moved to dismiss for lack of jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure, arguing that he is entitled to immunity under the FSIA. The FSIA provides that, subject to certain exceptions not relevant here, "a *foreign state* shall be immune from the jurisdiction of the courts of the United States." 28 U.S.C. § 1604 (emphasis added).

Plaintiffs, of course, did not bring this action against Somalia or any other foreign state—they brought it against Samantar individually. Under the FSIA, however, the term "foreign state" encompasses more than merely the foreign sovereign itself; "foreign state" includes "a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in [§ 1603(b)]." 28 U.S.C. § 1603(a).[2] A majority of the courts considering the scope of "agency or instrumentality" have concluded that an individual foreign official acting within the scope of his official duties qualifies as an "agency or

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[2] The FSIA distinguishes between "foreign state" and "agency or instrumentality of a foreign state" in only one instance—service of process under section 1608, which prescribes different methods for serving a foreign state and an instrumentality of that state. *See* 28 U.S.C. § 1608(a), (b). Otherwise, the phrase "agency or instrumentality of a foreign state" is essentially interchangeable with "foreign state" as those terms appear in the FSIA.

instrumentality of a foreign state." *See, e.g., Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1103 (9th Cir.1990).

The district court followed the majority view that individuals are covered under the FSIA and granted Samantar's motion to dismiss because "[t]he allegations in the complaint clearly describe Samantar, at all relevant times, as acting upon the directives of the then-Somali government in an official capacity, and not for personal reasons or motivation." J.A. 223. Additionally, the district court found it important that the current government in Somalia has expressly adopted the position that Samantar's alleged actions were taken in his official capacity.

The district court relied heavily upon two district court decisions. In *Belhas v. Ya'Alon*, 466 F.Supp.2d 127 (D.D.C.2006), a decision later affirmed by the District of Columbia Circuit Court of Appeals, *see* 515 F.3d 1279 (D.C.Cir.2008), the court held that former Israeli general Moshe Ya'Alon was entitled to sovereign immunity under the FSIA against claims by civilian bombing victims pursuant to the ATS and the TVPA based on attacks conducted by the Israeli military in a 1996 skirmish with Hezbollah. Ya'Alon submitted a letter from the State of Israel officially affirming that his alleged acts were within the scope and course of his official duties and were "approved by the government of Israel in defense of its citizens against terrorist attacks." 466 F.Supp.2d at 129 (internal quotation marks omitted). The court concluded that because plaintiffs attempted to impose liability based on Ya'Alon's command responsibility for state-approved attacks rather than

acts of a personal or private nature, Ya'Alon "was acting as an agency or instrumentality of the foreign state [and was therefore] immune from suit under the FSIA." *Id.* at 130. Similarly, in *Matar v. Dichter*, 500 F.Supp.2d 284 (S.D.N.Y.2007), the district court concluded that the FSIA immunized a former director of an Israeli intelligence agency from claims asserted under the ATS and the TVPA based on the director's involvement in the planning and execution of the bombing of a residential neighborhood in Gaza City. The district court in *Matar* based its conclusion on the absence of allegations suggesting that the director's conduct was of a personal nature and on a letter from the Israeli state department asserting that anything the director did in connection to the bombing incident was done in furtherance of his official duties.

In light of these decisions, the district court below reasoned that, "[a]s in the *Belhas* and *Matar* complaints, the complaint at issue does not allege that Samantar was acting on behalf of a personal motive or for private reasons." J.A. 218. The court further accorded "great weight" to the letters submitted by the current Somali government, concluding that the government's opinion reaffirmed that Samantar's involvement in the alleged atrocities was "in his official capacit[y]" and in furtherance of government efforts to "quell[ ] . . . the insurgencies from 1981 to 1989." J.A. 219. Accordingly, the district court concluded that Samantar was entitled to sovereign immunity under the FSIA and dismissed the plaintiffs' claims for lack of subject-matter jurisdiction. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989) ("[T]he text and

structure of the FSIA demonstrate Congress' intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts.")

Plaintiffs challenge the district court's application of the FSIA on numerous grounds. Plaintiffs' most fundamental assertion is that Congress did not intend for individual foreign officials to claim sovereign immunity under the FSIA, *i.e.*, that the FSIA applies only to foreign states, not to individuals. Alternatively, plaintiffs contend that, even if the FSIA does apply to individual foreign officials, such persons are immune only if they are agents or officials of a foreign state at the time of suit. The FSIA, plaintiffs argue, does not shield *former* officials like Samantar from suit. We address each of these issues below.[3]

II.

When Congress enacted the FSIA in 1976, it did so against a backdrop of foreign sovereign immunity jurisprudence spanning more than 150 years. *See*

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[3] Plaintiffs also contend that, even if the FSIA extends sovereign immunity to former foreign officials, the alleged acts attributed to Samantar, such as the torture and killing of civilians, are *per se* violations of "universally accepted norms of international law," *Kadic*, 70 F.3d at 243, which can never be within the scope of a foreign official's duties. Plaintiffs also claim that the FSIA is inapplicable because Somalia currently does not even exist in a form that would qualify it as a "foreign state" under the FSIA. *See* 28 U.S.C. § 1603(a). If there is no "foreign state," then *a fortiori* there is no "agency or instrumentality of a foreign state," 28 U.S.C. § 1603(b), as there would be no source from which an individual could derive sovereign immunity. In light of our disposition of this appeal, we need not address these arguments.

Amerada Hess, 488 U.S. at 434 n. 1, 109 S.Ct. 683. Beginning with *The Schooner Exchange*, 11 U.S. (7 Cranch) 116, 3 L.Ed. 287 (1812), the Supreme Court essentially granted absolute immunity from suit to all foreign states. Since foreign sovereign immunity is a matter of comity rather than constitutional law, the Court routinely "deferred to the decisions of the political branches . . . on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983). And, "[u]ntil 1952, the State Department ordinarily requested immunity in all actions against friendly foreign sovereigns." *Id.* In 1952, however, the State Department changed its policy of suggesting immunity in every case involving a foreign sovereign and instead adopted a restrictive theory of sovereign immunity which permitted "foreign states [to] be sued in United States courts for their commercial acts, but not for their public acts." *Amerada Hess*, 488 U.S. at 431 n. 1, 109 S.Ct. 683. One consequence of the restrictive theory, however, was that "foreign nations often placed diplomatic pressure on the State Department," which still bore the primary "responsibility for deciding questions of sovereign immunity." *Verlinden*, 461 U.S. at 487, 103 S.Ct. 1962.

In 1976, Congress enacted the FSIA, shifting responsibility for deciding questions of foreign sovereign immunity from the Executive Branch to the Judicial Branch "in order to free the Government from the case-by-case diplomatic pressures, [and] to clarify the governing standards." *Id.* at 488, 103 S.Ct. 1962; *see* 28 U.S.C. § 1602. The FSIA essentially codifies the restrictive theory of foreign

sovereign immunity under which a "foreign state" is "immune from the jurisdiction of the courts of the United States . . . except as provided in sections 1605 to 1607."[4] 28 U.S.C. § 1604. Congress did not define the term "foreign state" except to say that it "includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)." 28 U.S.C. § 1603(a). In turn, subsection (b) defines "agency or instrumentality of a foreign state" as

> any entity—
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

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[4] None of these sections contains an applicable exception in this case. *See* 28 U.S.C. § 1605 (exceptions to foreign state's presumptive immunity include waiver of immunity; commercial activity within or directly affecting the United States; various claims involving property; noncommercial torts committed in the United States; and maritime liens); § 1606 (prescribing the extent of a foreign state's liability on claims "with respect to which [it] is not entitled to immunity"); § 1607 (involving counterclaims in lawsuits brought in federal courts by a foreign state); *see generally Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439-40, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989) (listing and discussing exceptions set forth in § 1605).

28 U.S.C. § 1603(b).

Because there is no explicit mention of individuals or natural persons, it is not readily apparent that Congress intended the FSIA to apply to individuals. Before we address the merits of this issue, however, we must make sure that we are not foreclosed from doing so by circuit precedent.

A.

Samantar takes the position that we settled the question of whether the FSIA applies to individual foreign government officials in *Velasco v. The Government of Indonesia*, 370 F.3d 392 (4th Cir.2004), siding with the majority of the federal appellate courts that have directly addressed the issue.

As noted previously, the majority view clearly is that the FSIA applies to individual officials of a foreign state, as explained in the Ninth Circuit's seminal *Chuidian* decision. *See* 912 F.2d at 1099-1103. Most of the decisions embracing the view that individuals are covered by the FSIA either expressly adopt *Chuidian*'s reasoning or incorporate substantially similar reasoning. *See, e.g., In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71, 83 (2d Cir.2008) (explaining that "agency or instrumentality" is broad enough to encompass "senior members of a foreign state's government"); *Keller v. Central Bank of Nigeria*, 277 F.3d 811, 815-16 (6th Cir.2002) (concluding individual defendants were within "agency or instrumentality" provision); *Byrd v. Corporacion Forestal y Industrial de Olancho*, 182 F.3d 380, 388-89 (5th Cir.1999) (adopting majority position as articulated in *Chuidian*); *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 671

(D.C.Cir.1996) (same). *Chuidian* holds the definition of an "agency or instrumentality of a foreign state" under § 1603(b) encompasses "individual officials acting in their official capacity." 912 F.2d at 1101. By contrast, the Seventh Circuit stands alone in concluding that the FSIA does not apply to individuals. *See Enahoro v. Abubakar*, 408 F.3d 877, 881-82 (7th Cir.2005) (rejecting the *Chuidian* approach as inconsistent with the statutory text).

For the reasons that follow, we believe this is still an open question in the Fourth Circuit. In fairness to Samantar, however, he is not alone in his reading of *Velasco*, as a number of courts and commentators believe *Velasco* adopted the majority position. *See, e.g., Kensington Int'l Ltd. v. Itoua*, 505 F.3d 147, 160 (2d Cir.2007) (reading *Velasco* as "conclud[ing] that the FSIA applies to individuals acting in their official capacity" in reliance on *Chuidian*); Stewart, David P., *The UN Convention on Jurisdictional Immunities of States and Their Property*, 99 Am. J. Int'l L. 194, 196 n. 13 (2005) (including *Velasco* in a list of decisions by "[a] growing number of U.S. courts [that] have held that the FSIA applies to individual officials of foreign governments to the extent their actions were performed in their official capacities"). We do not read our decision in *Velasco* in this manner.

It is true that *Velasco* cited *Chuidian* and noted that numerous courts have construed the FSIA to cover individual foreign officials acting within the scope of their authority. *Velasco*, however, was ultimately focused on the wholly separate question of whether, and under what circumstances, the acts of an individual operate to *bind* a foreign sovereign

claiming immunity under the FSIA. *See Velasco*, 370 F.3d at 399-400.

The plaintiff in *Velasco* brought an action to collect on an Indonesian promissory note issued by staff members of Indonesia's National Defense Security Council ("NDSC"). Indonesia claimed sovereign immunity under the FSIA, and the parties agreed the only possible basis for jurisdiction was the FSIA's "commercial activity" exception under which there is no immunity against claims "based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. § 1605(a)(2). As it turned out, the promissory notes were fraudulent instruments that the NDSC staff members had no authority to issue. Indonesia argued that the lawsuit was not based on commercial activity "by [a] foreign state," *i.e.*, that the unauthorized conduct of the NDSC staffers could not be attributed to Indonesia. *See Velasco*, 370 F.3d at 398. Applying the well-established tenet that an "act of an agent beyond what he is legally empowered to do is not binding on the government," *id.* at 399, we concluded that

> [b]y issuing the notes, the individual Defendants acted ultra vires and in violation of Indonesian law. As a consequence, the issuance of the notes cannot be characterized as the commercial activity of a foreign state which divests the NDSC or the Government of Indonesia of their sovereign immunity.

Id. at 402. Thus, despite the reference to *Chuidian* and other decisions addressing the scope of § 1603(b), *Velasco* was not about whether an individual government official was entitled to sovereign immunity as an "agency or instrumentality of a

foreign state." Rather, it was about whether the Indonesian government was bound, through *agency principles*, by the unauthorized acts of individual government officials.[5]

Accordingly, *Velasco* did not settle the question of whether Congress intended to confer sovereign immunity under the FSIA on an individual acting within the scope of his authority.

B.

In determining congressional intent, we focus of course on the language of the provision at issue, but we also consider the overall structure and purpose of the statute. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992). Under the FSIA, an "agency or instrumentality of a foreign state" is defined as an "entity" that "is a separate legal person, corporate or otherwise." 28 U.S.C. § 1603(b)(1). The phrase "separate legal person" is laden with corporate connotations. Generally, courts use this phrase as "a convenient way to capture the essence of the principal of limited liability" that flows from "[t]he fiction of corporate personhood." *Beiser v. Weyler*,

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[5] *Velasco* also examined and rejected the question of whether a foreign state can be bound under the FSIA by an individual agent who has apparent but not actual authority. *See Velasco v. The Government of Indonesia*, 370 F.3d 392, 400 (4th Cir.2004) ("Whether a third party reasonably perceives that the sovereign has empowered its agent to engage in a transaction . . . is irrelevant if the sovereign's constitution or laws . . . do not authorize the agent's conduct and the third party fails to make a proper inquiry. We conclude that a foreign official's manifestation of authority to bind the sovereign is insufficient to bind the sovereign.").

284 F.3d 665, 670 (5th Cir.2002). "A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474, 123 S.Ct. 1655, 155 L.Ed.2d 643 (2003). The idea of a "[s]eparate legal personality has been described as an almost indispensible aspect of the public corporation." *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 625, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983) (internal quotation marks omitted). We find the Seventh Circuit's view of this passage especially persuasive:

> [I]f it was a natural person Congress intended to refer to, it is hard to see why the phrase "separate legal person" would be used, having as it does the ring of the familiar legal concept that corporations are persons, which are subject to suit. Given that the phrase "corporate or otherwise" follows on the heels of "separate legal person," we are convinced that the latter phrase refers to a legal fiction—a business entity which is a legal person. If Congress meant to include individuals acting in the official capacity in the scope of the FSIA, it would have done so in clear and unmistakable terms.

Enahoro, 408 F.3d at 881-82. Thus, the FSIA's use of the phrase "separate legal person" suggests that corporations or other business entities, but not natural persons, may qualify as agencies or instrumentalities.

Moreover, in order to ensure that an "agency or instrumentality" seeking the benefits of sovereign immunity is actually connected to a "foreign state," the FSIA requires that the "entity" be "neither a citizen of a State of the United States *as defined in*

section 1332(c) and (e) of [Title 28], nor *created* under the laws of any third country." 28 U.S.C. § 1603(b)(3) (emphasis added). Sections 1332(c) and (e), which govern the citizenship of corporations and legal representatives of estates, are inapplicable to individuals, and it is nonsensical to speak of an individual, rather than a corporate entity, being "created" under the laws of a country.

Construing "agency or instrumentality" to refer to a political body or corporate entity, but not an individual, is also consistent with the overall statutory scheme of the FSIA. Section 1608, for example, establishes the exclusive means for service of process on a foreign state or its agencies or instrumentalities. *See* 28 U.S.C. § 1608(a), (b); Fed.R.Civ.P. 4(j)(1). Section 1608(b), which addresses service upon an agency or instrumentality, does not contemplate service on an individual, but instead provides that absent a "special arrangement for service between the plaintiff and the agency or instrumentality," service must be perfected "by delivery of a copy of the summons and complaint either to an *officer*, a *managing or general agent*, or to any other agent *authorized by appointment or by law* to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents." 28 U.S.C. § 1608(b) (emphasis added). This language is strikingly similar to the general procedural rule for service on a corporation or other business entity. *See* Fed.R.Civ.P. 4(h)(1)(B). The requirements for serving an individual, by contrast, can be found back in Rule 4(e) ("Serving an Individual Within a Judicial District of the United States"), or even Rule 4(f) ("Serving an Individual in a Foreign Country"). The

fact that section 1608 uses language virtually identical to that found in Rule 4(h) for service upon corporate entities and fails to prescribe or refer to service provisions for individual defendants strongly supports our interpretation that "an agency or instrumentality of a foreign state" cannot be an individual.

We also find confirmation for our understanding of the FSIA in the House Committee Report on the FSIA. The House Report explained that "separate legal person" was "intended to include a corporation, association, foundation, or any other entity which, under the law of the foreign state where it was created, can sue or be sued in its own name, contract in its own name or hold property in its own name." H.R.Rep. No. 94-1487, at 15 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6614. The House Committee Report provided some examples of entities that would satisfy the prerequisites for an agency or instrumentality under section 1603(b), "including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name." H.R.Rep. No. 94-1487, at 16, *as reprinted in* 1976 U.S.C.C.A.N. at 6614.

Accordingly, we conclude, based on the language and structure of the statute, that the FSIA does not apply to individual foreign government agents like Samantar. Accordingly, the district court erred by concluding that Samantar is shielded from suit by the FSIA.

III.

Plaintiffs also present the closely related argument that the FSIA requires the court to assess whether an entity qualifies as an "agency or instrumentality of a foreign state" under section 1603(b) based on that entity's status at the time that the action is filed rather than the time of the underlying conduct. More simply, plaintiffs believe that even if the FSIA applies to individual defendants, Congress did not intend to shield *former government agents* from suit under the FSIA. We agree.

The Supreme Court addressed the temporal implications of section 1603(b) in *Dole Food Co. v. Patrickson*, 538 U.S. 468, 123 S.Ct. 1655 (2003). In *Dole Food*, the Dead Sea Companies corporation claimed immunity under the FSIA as an instrumentality of the State of Israel, which owned a majority share in parent companies of the Dead Sea Companies at the time of the events being litigated but not at the time of suit. *See* 28 U.S.C. § 1603(b)(2) ("An 'agency or instrumentality of a foreign state'" includes an entity "a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof."). The Court held that "the plain text of this provision, because it is expressed in the present tense, requires that instrumentality status be determined at the time suit is filed." *Id.* at 478, 123 S.Ct. 1655. The Court explained that its focus on the significance of the present tense was faithful to the general rule "that 'the jurisdiction of the Court depends upon the state of things at the time of the action brought.'" *Id.*

(quoting *Keene Corp. v. United States*, 508 U.S. 200, 207, 113 S.Ct. 2035, 124 L.Ed.2d 118 (1993)).

Samantar argues that *Dole Food* does not apply here because the Court was construing language that applied exclusively to corporations. Unfortunately for Samantar, this argument knocks the legs out from under his own contention that the FSIA applies to individuals. If, as Samantar suggests, an individual can be an "agency or instrumentality of a foreign state," then the language of section 1603(b)(2)—the very section considered in *Dole Food*—*must* apply to both corporations *and* individuals. An entity, regardless of its form, can be an "agency or instrumentality of a foreign state" only if that entity satisfies all three provisions of subsection (b). *See* 28 U.S.C. § 1603(b). Therefore, we cannot dismiss the Supreme Court's construction merely because the defendant in *Dole Food* was a corporate entity. And, like the "ownership interest" clause at issue in *Dole Food*, the clause immediately preceding it is also expressed in the present tense. Under section 1603(b)(2), an entity can be an "agency or instrumentality of a foreign state" only if that entity "*is* an organ of a foreign state or political subdivision thereof." 28 U.S.C. § 1603(b)(2) (emphasis added); *cf. Yi v. Federal Bureau of Prisons*, 412 F.3d 526, 533 (4th Cir.2005) (noting "the strong presumption that identical terms used in the same sentence of a statute carry the same meaning"). Samantar's interpretation would require us to bypass the plain text of the statute in favor of a reading at odds with *Dole Food*. We see nothing in the statute suggesting that, if Congress intended individual foreign officials to be covered by the FSIA in the first place, it likewise intended to treat individuals

differently than any other entity qualifying as an "agency or instrumentality" or depart from the principle that jurisdiction hinges on "the state of things at the time of the action" only in the case of individuals. *Dole Food*, 538 U.S. at 478, 123 S.Ct. 1655 (internal quotation marks omitted).

Finding the plain text unavailing, Samantar offers a policy basis for distinguishing between former individual government officials and corporations formerly owned by a foreign state. He suggests that when a government sells or transfers its majority interest in a corporation, the new purchasers have an opportunity to bargain for indemnification for any liabilities arising before the transfer of ownership, making immunity from suit less critical than it is for former individual government agents, who have no such opportunity. Beyond requiring us to ignore unambiguous language in a statute, which we cannot do, *see Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461-62, 122 S.Ct. 941, 151 L.Ed.2d 908 (2002), Samantar's reasoning is inconsistent with the purpose of foreign sovereign immunity, which is to protect international relations between the United States and foreign sovereigns as a matter of comity. *See Republic of Austria v. Altmann*, 541 U.S. 677, 696, 124 S.Ct. 2240, 159 L.Ed.2d 1 (2004). Samantar's hypothesis, by contrast, focuses on the protection of individual foreign officials in a way that is reminiscent of qualified immunity or other status-based immunities that are concerned with matters as they exist at the time of the offending conduct.

Dole Food is instructive on this point, explaining that qualified immunity, for example, "prevent[s] the

threat of suit from crippling the proper and effective administration of public affairs," *id.* at 479, 123 S.Ct. 1655 (alteration and internal quotation marks omitted), while "[f]oreign sovereign immunity, by contrast, is *not meant to avoid chilling* foreign states or their instrumentalities *in the conduct of their business* but to give foreign states and their instrumentalities some protection from the inconvenience of suit as a gesture of comity between the United States and other sovereigns." *Id.* (emphasis added); *see Verlinden*, 461 U.S. at 486, 103 S.Ct. 1962 (explaining that the underpinnings of "foreign sovereign immunity" are "a matter of grace and comity on the part of the United States"). The doctrine of foreign sovereign immunity developed in the pre-FSIA common law out of a concern for "our national interest" and the preservation of amicable international relations. *Ex parte Republic of Peru*, 318 U.S. 578, 589, 63 S.Ct. 793, 87 L.Ed. 1014 (1943); *Republic of Mexico v. Hoffman*, 324 U.S. 30, 36, 65 S.Ct. 530, 89 L.Ed. 729 (1945) (observing that the assertion of judicial power over the property of a foreign state may be viewed as "an affront to its dignity and may . . . affect our relations with it"). The FSIA preserves this basic purpose of sovereign immunity, which "has never been to permit foreign states and their instrumentalities to shape their conduct in reliance on the promise of future immunity from suit," but instead "aims to give foreign states . . . some *present* protection from the inconvenience of suit as a gesture of comity." *Altmann*, 541 U.S. at 696, 124 S.Ct. 2240 (internal quotation marks omitted) (emphasis in original).

In sum, we conclude that even if an individual foreign official could be an "agency or instrumentality

under the FSIA," sovereign immunity would be available only if the individual were still an "agency or instrumentality" at the time of suit. *Dole Food* guides our resolution of this issue, regardless of whether the purported agency or instrumentality is a corporation owned by a foreign government or an individual foreign official; we see nothing in the statute or its underlying purpose to suggest otherwise. Samantar was certainly no longer a Somali government official at the time the plaintiffs brought this action and is therefore not entitled to immunity under the FSIA.

IV.

For these reasons, we reverse the decision of the district court that it lacks subject matter jurisdiction under the FSIA, and we remand for further proceedings. Samantar suggests, despite the adverse ruling on the question of sovereign immunity, that we ought to affirm the result on alternative grounds. Samantar contends that, even if he is not covered under the FSIA, he is shielded from suit by a common law immunity doctrine such as head-of-state immunity. *See In re Grand Jury Proceedings*, 817 F.2d 1108, 1110 ("Head-of-state immunity is a doctrine of customary international law . . . maintain[ing] that a head of state is immune from the jurisdiction of a foreign state's courts, at least as to authorized official acts taken while the ruler is in power.") (4th Cir.1987); *see also Ye v. Zemin*, 383 F.3d 620, 625 (7th Cir.2004) ("Because the FSIA does not apply to heads of states, the decision concerning the immunity of foreign heads of states remains vested where it was prior to 1976—with the Executive Branch."). He also contends that plaintiffs'

claims under the ATS and the TVPA are time-barred, and that plaintiffs' claims are also barred because they failed to exhaust their legal remedies in Somalia. In view of its conclusion that it lacked jurisdiction, the district court did not address these issues below. We conclude that these questions are better addressed in the first instance by the district court and therefore decline to address them now. We conclude only that Samantar is not entitled to sovereign immunity under the FSIA; whether he can successfully invoke an immunity doctrine arising under pre-FSIA common law is an open question which Samantar is free to pursue on remand, along with the aforementioned procedural questions. Finally, our decision should not be read to intimate that plaintiffs have necessarily stated viable claims against Samantar under the ATS or TVPA; those are also open questions for remand.

REVERSED AND REMANDED

DUNCAN, Circuit Judge, concurring in Parts I and II and concurring in the judgment:

With respect, I join in all but Part III of Judge Traxler's incisive opinion. I agree with the majority that the Foreign Sovereign Immunities Act ("FSIA") does not, upon examination of its plain language and the context of its drafting, apply to individual officers of foreign states. I note as well that our decision on this issue is not the radical departure from the course of current authority that it might seem. While few of our sister circuits have reached the same conclusion, the United States Department of State has argued in analogous cases that the common law immunities that predate the FSIA remain the appropriate body of

law under which courts should consider the sovereign immunity of individuals. Our decision in this case is in keeping with this position and with the statutory text of the FSIA itself. I therefore concur in Parts I and II of the opinion and in the judgment reversing the district court and remanding this case for further proceedings.

Our conclusion that the FSIA does not apply to individuals is sufficient to resolve the case before us. Therefore, I do not join my colleagues in reaching the question of whether and how *Dole Food Co. v. Patrickson*, 538 U.S. 468, 123 S.Ct. 1655 (2003), would apply to individual foreign officers. Prudential considerations also militate against an expansive holding. Sovereign immunity, while a judicial question, is inextricably bound up with the executive branch's conduct of foreign affairs, and I would prefer to err on the side of caution in the extension of our jurisprudence.

FILED: January 8, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-1893
(1:04-cv-01360-LBM)

BASHE ABDI YOUSUF; OFFICER JOHN DOE 1; JANE DOE 1; JOHN DOE 2; JOHN DOE 3; JOHN DOE 4; AZIZ DERIA,

Plaintiffs - Appellants

v.

MOHAMED ALI SAMANTAR,

Defendant - Appellee

ALLARD K. LOWENSTEIN INTERNATIONAL HUMAN RIGHTS CLINIC, Yale Law School; AMERICAN FRIENDS SERVICE COMMITTEE; BOSTON CENTER FOR REFUGEE HEALTH AND HUMAN RIGHTS; CONSISTENT LIFE; EARTHRIGHTS INTERNATIONAL; DOLLY FILARTIGA; FLORIDA CENTER FOR SURVIVORS OF TORTURE; GLOBAL LAWYERS AND PHYSICIANS; HUMAN RIGHTS FIRST; HUMAN RIGHTS WATCH; MARYKNOLL OFFICE OF GLOBAL CONCERNS; MUSLIM PUBLIC AFFAIRS COUNCIL; SISTER DIANNA ORTIZ; PROGRAM FOR SURVIVORS OF TORTURE AND SEVERE

TRAUMA; PROGRAM FOR TORTURE VICTIMS; ROCKY MOUNTAIN SURVIVORS CENTER; SURVIVORS OF TORTURE, INTERNATIONAL; THE SHALOM CENTER; TORTURE ABOLITION AND SURVIVORS SUPPORT COALITION INTERNATIONAL; WORLD ORGANIZATION FOR HUMAN RIGHTS USA; INTERNATIONAL RIGHTS ADVOCATES; INTERNATIONAL HUMAN RIGHTS CLINIC, Human Rights Program of Harvard Law School; UNITED STATES MEMBER OF CONGRESS AND LAW PROFESSORS,

Amici Supporting Appellant

JUDGMENT

In accordance with the decision of this Court, the judgment of the District Court is reversed. This case is remanded to the District Court for further proceedings consistent with the Court's decision.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

United States District Court, E.D. Virginia,
Alexandria Division
Bashe Abdi YOUSUF, et al., Plaintiffs,
v.
Mohamed Ali SAMANTAR, Defendant.
No. 1:04cv1360

Aug. 1, 2007.

Robert R. Vieth, Cooley Godward Kronish LLP, Scott A. Johnson, Reston, VA, for Plaintiffs.

Harvey Joseph Volzer, Alexandria, VA, for Defendant.

MEMORANDUM OPINION

LEONIE M. BRINKEMA, United States District Judge.

Plaintiffs, members of the Isaaq clan of Somalia, filed this civil action under the Torture Victim Protection Act of 1991 ("TVPA"), 28 U.S.C. § 1350 (Note), and the Alien Tort Claims Act ("ATCA"),[1] 28 U.S.C. § 1350, against Mohamed Ali Samantar ("Samantar"), a former First Vice President, Minister of Defense, and Prime Minister of the Democratic Republic of Somalia. In their complaint, plaintiffs allege that Samantar, as the official who was in charge of the Somalia Armed Forces in the 1980s and 1990s, is liable for acts of torture; extrajudicial killing; attempted extrajudicial killing; crimes against humanity; war crimes; cruel, inhuman, and

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[1] This statute is also sometimes referred to as the Alien Tort Statute, or the ATS.

degrading treatment or punishment; and the arbitrary detention of the plaintiffs. Samantar moves to dismiss the Second Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1). For the reasons stated in open court on April 27, 2007, and more fully set forth below, Samantar's motion has been granted.

I. FACTUAL BACKGROUND[2]

Plaintiffs allege that in October 1969, a coup led by Major General Mohamed Siad Barre ushered in an authoritarian socialist rule to Somalia. Power was assumed by the Supreme Revolutionary Council ("SRC"), which consisted primarily of the Army officers who had supported and participated in the coup, including Samantar. The SRC suspended the existing Constitution, closed the National Assembly, abolished the Supreme Court and declared all groups not sponsored by the government, including civic or religious groups, to be illegal. The military leadership also systematically favored its own clans and oppressed other clans.[3] The military leadership built upon and exploited the clan system by appointing members of favored clans to top governmental and military positions while also

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[2] Because this matter comes before the Court on a motion to dismiss, the factual allegations in the complaint are accepted as true and viewed in the light most favorable to the plaintiffs. *See Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir.1999). Accordingly, the following recitation adopts the plaintiffs' version of the events.

[3] Even before Somalia became an independent nation, the clan system served as the fundamental building block of Somali society and attracted great emotional allegiance.

oppressing and targeting other clans, especially the Isaaq clan in the northern regions.

Plaintiffs further allege that after Somalia was defeated in the Ogden War with Ethiopia in 1978, the government took increasingly fierce measures against perceived opponents. Beginning in the early 1980s, the military committed numerous atrocities against ordinary citizens in an attempt deter the growing opposition movements. Security forces, acting in coordination with or under the control of the Samantar-led military forces, were together responsible for the widespread and systematic use of torture, arbitrary detention, and extrajudicial killing against the civilian population of Somalia.

Members of the Isaaq clan, located primarily in the northwestern region of Somalia, were a special target of the government because they were among the best educated and most prosperous Somalis, and therefore perceived as potential opponents to the Barre regime. In the 1970s, the government relied primarily upon economic measures to weaken the Isaaq clan. During the 1980s, however, when Samantar was Minister of Defense and then Prime Minister, the government altered its approach and began utilizing the military forces in a campaign to eliminate Isaaq clan opposition. In response to this campaign, some members of the Isaaq clan established the Somali National Movement ("SNM") in 1981. In 1983 and 1984, some members of the SNM began a campaign of violent resistance and, operating from bases in Ethiopia, SNM commandos attacked military posts near the northern Somali cities of Hargeisa, Burao, and Berbera.

Plaintiffs allege that in response to the SNM attacks, human rights abuses and war crimes by the Somali military forces increased dramatically. The Somali National Army initiated a counterinsurgency campaign that disregarded the distinction between civilians and SNM fighters. It killed and looted livestock, blew up water reservoirs, destroyed homes, tortured and detained alleged SNM supporters, and indiscriminately killed civilians. These violent confrontations between SNM and the Somali Armed Forces lasted from 1983 to 1990.

Throughout 1989 and 1990 the oppression and armed resistence continued, gradually leading to the reduced effective territorial control of the Barre regime and the withdrawal of American and international support. By the end of 1990, the Barre regime was in the final stages of complete state collapse. In early December 1990, President Barre declared a state of emergency and, in January 1991, armed opposition factions finally drove Barre out of power, resulting in the complete collapse of the central government. When Barre and his supporters were ousted in 1991, Samantar fled to Italy, finally arriving in the United States in 1997.

After the Barre regime's overthrow early in 1991, Somalia descended into turmoil.[4] It has been without a central government since this time and much of the territory has been subject to serious civil strife. Beginning in 1993, a two-year United Nations ("UN")

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[4] At this time, the northern region of Somalia withdrew from the rest of the country and formed the Republic of Somaliland. Somaliland is not formally recognized by any nation, including the United States. This region has, however, enjoyed relative stability compared to the rest of Somalia.

humanitarian effort was able to alleviate some of the famine conditions, mainly in southern Somalia, but the UN was forced to withdraw in 1995 because of Somalia's clan-based civil war and anarchic violence.

In October 2004, a two-year peace process led by the government of Kenya concluded. At this time Abdullahi Yusuf Ahmed was elected as President of the Transitional Federal Government of Somalia ("TFG") and a transitional government, known as the Somalia Transitional Federal Institutions ("TFIs"), was formed.[5] The Somalia TFIs include a 275-member parliamentary body, known as the Transitional Federal Assembly ("TFA"), a transitional Prime Minister, Ali Mohamed Gedi, and a 90-member cabinet. The TFG has been deeply divided since just after its creation and until late December 2006 controlled only the town of Baidoa. In June 2006, a loose coalition of clerics, business leaders, and Islamic court militias, known as the Supreme Council of Islamic Courts ("CIC" or "Courts"), defeated powerful Mogadishu warlords and took control of the capital. The Courts continued to expand, spreading their influence throughout much of southern Somalia and threatening to overthrow the TFG. Ethiopian and TFG forces, with the backing of the United States, concerned over suspected links between some CIC factions and al-

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[5] Although the complaint does not discuss the status of post-1995 Somalia in detail, it is appropriate to understand the environment in which this case was brought. Accordingly, this opinion includes information about Somalia found in the CIA's World Fact Book. *https://www.cia.gov/cia/publications/factbook/geos/so.html* (last visited July 27, 2007), and the United States Department of State Bureau of African Affairs Web site, *http://www.state.gov/p/af/ci/so* (last visited July 27, 2007).

Qaida, drove the CIC from power in late December 2006, but remnants of CIC militia remain near the Kenyan border. The TFG, backed by Ethiopian forces, was also able to move into Mogadishu at this time, but it continues to struggle to exert control over the capital.

The United States is deeply involved in the process of rebuilding Somalia, primarily out of a concern that the chaos in the region has allowed it to become a breeding ground for terrorists, including al-Qaida. *See* United States Department of State ("State Department"), Background Note: Somalia, *at http://www.state.gov/r/pa/ei/bgn/2863.htm* ("After the attack on the United States of September 11, 2001, Somalia gained greater international attention as a possible entrepot for international terrorism—a concern that became the primary element in U.S. policy toward Somalia.") (last visited July 31, 2007). This support extends to coordination with the Transitional Federal Government. *See id.* ("The United States maintains contacts with the Transitional Federal Government and other key stakeholders in Somalia through the U.S. Embassy in Nairobi, Kenya."). James Swan, Deputy Assistant Secretary for African Affairs at the State Department spoke on April 21, 2007, and stated that "the United States will do all we can to help enhance the TFI's governance capacity, as well as increase support for efforts to build governance capacity at the local and regional level." *See* "United States Policy in Somalia," *at http://www.state.gov/p/af/rls/rm/83935.htm* (last visited July 31, 2007). Secretary of State Condoleeza Rice reiterated these sentiments when she appointed Ambassador John M. Yates as Special Envoy for Somalia, stating that "[t]he United States is

committed to helping Somalis develop their national institutions and overcome the legacy of violence and disorder of the past." *See* "Appointment of Special Envoy for Somalia," May 17, 2007, *at http://www.state.gov/secretary/rm/2007/may/85116.htm* (last visited July 31, 2007). The United States has also met with the Prime Minister of the Somalia Transitional Federal Government, Ali Mohamed Gedi, as part of the United States's "efforts supporting lasting peace and stability in Somalia." *See* "Meetings with Somali Prime Minister Ali Mohamed Gedi," *at http://www.state.gov/r/pa/prs/ps/2007/jun/87331.htm* (last visited July 31, 2007).

These official statements and meetings by United States government officials underscore this country's support for the Somalia TFG. Although that support is not unconditional, it appears that the United States's current policy is to embrace the possibility of democracy in Somalia through these institutions. These statements also highlight, however, the wide-ranging instability that still permeates the region.

II. THE PARTIES

A. Plaintiff Bashe Abdi Yousuf

Plaintiff Bashe Abdi Yousuf ("Yousuf") is a native of Somalia and is currently a naturalized United States citizen. Yousuf was a young businessman in Hargeisa, Somalia, when he formed a group called UFFO, with the stated goal of improving living conditions in Hargeisa. Yousuf alleges that on or about November 19, 1981, three National Security Service ("NSS") agents entered the warehouse where he was working, forced him into a truck, and took him to a building reserved for the detention and interrogation of members of UFFO. He was

searched, put in a room, and left for two days without food or water. Then, in early December 1981, two military policemen and an NSS officer came to his cell, blindfolded, handcuffed, and forced him into the back of a truck. When the vehicle stopped, Yousuf was forced down on the ground where the interrogators tightly tied his hands and feet together behind his back so that his body was arched backward in a slightly-tilted "U" shape, with his arms and legs in the air. The interrogators then placed a heavy rock on his back, causing him excruciating pain.[6] They also tightened the ropes, causing deep cuts in his arms and legs. The interrogators questioned Yousuf about the members and activities of UFFO and told him they would stop the torture if he confessed to anti-government crimes. During the three months he was detained, Yousuf was also subjected to eight sessions of waterboarding[7] and twice endured electric shocks to his armpits.

On or about February 28, 1982, Yousuf and the other detained members of UFFO were taken before the National Security Court, a special military court with jurisdiction over civilians accused of national security crimes, including political offenses. The trial for the twenty-eight men lasted two days. Although Yousuf pleaded not guilty, he was sentenced to twenty years in prison, and immediately taken to Hargeisa Central Prison where he remained for eight

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[6] Plaintiffs describe this form of torture as the "Mig," because it placed the prisoner's body in a shape that resembled the Somali Air Force's MIG aircraft.

[7] Waterboarding is a form of torture whereby the individual is immobilized and water is poured over the face, simulating drowning.

months. He was then transferred to Labaatan Jirow prison and placed in a small, windowless cell approximately six feet by six feet. He remained in solitary confinement, in near total darkness, for approximately six and a half years. He was released from prison in May 1989 and fled Somalia. He arrived in the United States in 1991.

B. Plaintiff Aziz Mohamed Deria, in his capacity as personal representative of the estates of Mohamed Deria Ali and Mustafa Mohamed Deria

In 1983, plaintiff Aziz Mohamed Deria fled Somalia because of persecution for his political activities on behalf of the Isaaq clan. He is now a naturalized United States citizen, although many of his family members, including his father, Mohamed Deria Ali, and his younger brother, Mustafa Mohamed Deria, remained in Somalia.

Plaintiff alleges that in mid-June 1988, a group of approximately twenty members of the Somali military forcibly entered the family's home and stated that they were going to kill all the members of the Isaaq clan that day. They grabbed Mohamed Deria Ali and dragged him out of the house. Later that afternoon, the same group of soldiers returned to the family's home and reported that Mohamed Deria Ali had been killed. They then abducted Mustafa Mohamed Deria, who has not been seen again.

C. Plaintiffs John Doe I and Aziz Mohamed Deria, in his capacity as personal representative of the estates of James Doe I and James Doe II

In December 1984, plaintiff John Doe I, a native, citizen, and resident of Somalia,[8] along with two of his brothers, decedents James Doe I and James Doe II, and a young nephew were tending the family's camels in the rural areas around Burao, a small city in the north of Somalia. A large group of Somali soldiers approached and interrogated them about SNM activity in the area the previous evening. When they denied having any knowledge of SNM activities, they were forced into a military truck and taken to the military installation in the village of Magaaloyar, where they were tied in the "Mig" position, beaten and kicked. Eventually the soldiers threw the three brothers into the back of an army truck, while still tied in the "Mig" position, and transported them to the military base in Burao, where they were interrogated.

The next day they were taken to the military court in Burao. Two of the soldiers who had detained the three brothers testified that they had hidden SNM fighters and probably were themselves members of the SNM. Although the brothers' attorney, whom they had met for the first time only at the start of the trial, argued that the brothers were innocent, they were convicted and, four days later, the brothers and other prisoners were sentenced to

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[8] John Doe I, John Doe II, and Jane Doe requested permission to proceed anonymously because they feared reprisals against themselves or their families as a result of their participation in this lawsuit. This motion was granted on January 7, 2005 (docket # 25).

death, with the sentence to be executed immediately. The prisoners to be executed were then directed out of the courthouse and into army trucks waiting at the courthouse. As John Doe I and his brothers entered the truck, an officer asked John Doe I whether the three men were brothers. When John Doe I answered yes, he untied John Doe I from his brothers, led him to the front gate and ordered the guard at the gate to let him escape. As John Doe I ran down the road away from the courthouse, he was passed by the truck carrying the condemned prisoners, including his two brothers. The truck was heading for the road to the Burao airport, a well-known execution site. As he reached his brothers' house, he heard the sound of gunshots and saw many people running toward the airport. James Doe I and James Doe II were among the men executed.

D. Plaintiff Jane Doe

Plaintiff Jane Doe is a native and citizen of Somalia who currently resides in the United Kingdom. She alleges that one night in or around July 1985, while she was at home with her family in Hargeisa, several NSS agents broke into her house and took her and the other family members to NSS headquarters, where they were detained for one week. Jane Doe, who was then a student, was accused of being a "subversive leader" for her alleged support of the SNM. A few days later, she was taken to the headquarters of the 26th Military Sector, the headquarters for all military and security forces in the northern region of Somalia, and held in a very small cell with one other woman. Her arms were tied behind her back with wire and then chained to the wall, and her left leg was chained to the floor. She

was detained at the 26th Military Sector headquarters in this manner for three months.

Jane Doe alleges that she was regularly interrogated and tortured during her detention at the Military Sector headquarters and raped at least fifteen times.[9] The rapes occurred in a locked, dark room, however, she could see that the rapist was wearing a camouflage uniform. Throughout this period and after, Jane Doe suffered constant and severe physical pain, but she never received medical attention for her injuries.

Months later, Jane Doe was taken from her cell, loaded into an Army truck and taken to the National Security Court. At her trial, Jane Doe was not permitted defense counsel nor was evidence presented against her. The following day, the National Security Court sentenced her to life in prison. She was immediately taken to a truck waiting outside the courthouse and severely beaten by soldiers. Because of this beating, she could not stand or walk for months. Jane Doe was taken to Hargeisa Central prison, where she was held alone in a very small cell measuring approximately 3 1/2 feet by 5 1/2 feet with her hands tied together in front of her at all times. She remained in solitary confinement for the next three-and-a-half years.

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[9] Like other girls in Somalia, Jane Doe had been subject to the practice of infibulation, a procedure whereby her vagina had been sewn closed except for a very tiny hole through which urine and menstrual blood could flow. She alleges that her rapist opened her vagina by cutting through her skin with the part of a fingernail clipper used for cleaning under the fingernails.

In November 1989, Jane Doe and three other women prisoners were taken to Mogadishu in an Army airplane. On the sixth night after their arrival, they were taken by Army soldiers to the presidential villa to see Major General Siad Barre, who asked Jane Doe why she supported the SNM. He told her to stay away from SNM and released her from prison, but ordered her not to leave the country. After her release, Jane Doe fled Somalia and later emigrated to the United Kingdom.

E. Plaintiff John Doe II

Plaintiff John Doe II is a native, citizen, and current resident of Somalia. During the Spring of 1988, John Doe II, a non-commissioned Isaaq officer in the Somali National Army, was assigned to the Hargeisa Department of Public Works to help with the repair of the Hargeisa airport. In or around June 1988, he was arrested by an Army officer and immediately taken to the headquarters of the 26th Military Sector. The next afternoon, Army soldiers began taking prisoners and executing them at Malko Dur-Duro, a well-known execution site. Later that evening, Army soldiers took John Doe II and three other Isaaq officers from their cells and drove them to Malko Dur-Duro. An Army officer ordered Red Beret soldiers to shoot the prisoners. The Red Berets shot at the men and they all fell backward into the riverbed. John Doe II received only flesh wounds and briefly fell unconscious. When he awoke, he found himself lying among the dead bodies. He remained there, covered by dead bodies, until the mass execution was completed and the soldiers had left the area. He subsequently fled Hargeisa and did not return until 1991.

F. Defendant Samantar

Samantar is a native and citizen of Somalia who currently resides in Fairfax, Virginia, in the Eastern District of Virginia. From about January 1980 to December 1986 he served as First Vice President and Minister of Defense of the Democratic Republic of Somalia. On or about January 1987, he was appointed Prime Minister of Somalia, a position he held until approximately September 1990. The plaintiffs allege that at all relevant times between 1980 and 1987, Samantar, as Minister of Defense, possessed and exercised command and effective control over the Somali military. They allege that he knew, or should have known, that his subordinates had committed, were committing, or were about to commit extrajudicial killings, attempted extrajudicial killings, torture, crimes against humanity, war crimes, cruel, inhuman, or degrading treatment, or arbitrary detentions. Plaintiff further alleges that, as Prime Minister from 1987 to 1990, Samantar possessed and exercised command and effective control over the Somalia military and that he was in Hargeisa in May and June of 1988 and had command of the military forces that were engaged in the indiscriminate attacks upon the civilian population. Lastly, they allege that he knew, or should have known, of the pattern and practice of gross human rights abuses perpetrated against the civilian population by subordinates under his command.

III. PROCEDURAL BACKGROUND

The complaint in this civil action was originally filed on November 10, 2004. The defendant was properly served and responded by filing a motion to dismiss. The motion was fully briefed and a hearing

was held on January 7, 2005. As a result of issues raised in the motion to dismiss and during the hearing, the Court stayed the proceedings to determine whether the State Department planned to provide a Statement of Interest regarding Samantar's assertion that he was entitled to sovereign immunity. The Court ordered Samantar to provide monthly updates regarding the State Department's position.[10] Each of Samantar's monthly reports to the Court reported that the State Department had the matter "still under consideration."

After waiting two years for the State Department to provide some response to Samantar's request for a Statement of Interest, the Court reinstated the case to the active docket. Order, January 22, 2007. During a status conference held on February 23, 2007, the plaintiffs stated their intention to file a second amended complaint that added a new cause of action, the joint criminal enterprise theory of liability, dismissed John Doe III and John Doe IV as plaintiffs, and inserted plaintiff Aziz Mohamed Deria, in his capacity as personal representative. Plaintiffs' Motion for Leave to File the Second Amended Complaint was granted on March 9, 2007. Shortly thereafter, Samantar filed the instant Motion to Dismiss Second Amended Complaint, in which he argues, *inter alia*, that the Court lacks subject matter jurisdiction over the complaint because he is immune

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[10] Shortly thereafter, the plaintiffs filed their first amended complaint, which mirrored the original complaint but included the use of pseudonyms for certain plaintiffs. Samantar then renewed his motion to dismiss and the matter was again fully briefed. No hearing was held, however, because the Court was awaiting the position of the State Department.

from suit under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1602-1611.[11]

The plaintiffs filed an opposition, to which Samantar replied. The parties appeared before the Court on April 27, 2007, for a hearing on the motion. The Court granted the defendant's motion in an oral ruling from the bench and stated that the reasons for dismissal would be more fully explained in a written opinion.

IV. DISCUSSION

A motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) is reviewed under the same standards as a motion to dismiss for failure to state a claim under Rule 12(b)(6). *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 128 (2d Cir.2003). On a motion to dismiss, a court must accept the material facts alleged in the complaint as true and construe all reasonable inferences in a plaintiff's favor. *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999).

When a defendant challenges subject matter jurisdiction via a Rule 12(b)(1) motion to dismiss, the pleadings may be regarded as mere evidence on the issue and evidence outside the pleadings may be considered without converting the motion to dismiss into a motion for summary judgment. *See Velasco v. Government of Indonesia*, 370 F.3d 392, 398 (4th Cir.

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[11] Samantar also argues that "joint criminal enterprise" is not a valid theory of liability, that he was entitled to common law head-of-state immunity, that the action is barred by the applicable ten-year statute of limitations, and that the plaintiffs failed to exhaust their available remedies in Somalia as required by the TVPA. Because the Court finds that application of the FSIA is dispositive, the other issues will not be reached.

2004). Moreover, "[w]here the motion to dismiss is based on a claim of foreign sovereign immunity, which provides protection from suit and not merely a defense to liability, . . . the court must engage in sufficient pretrial factual and legal determinations to satisfy itself of its authority to hear the case before trial." *Id.* (*quoting Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1027-28 (D.C. Cir. 1997)).

A. The Foreign Sovereign Immunities Act

Samantar claims that, as Somalia's former Minister of Defense and Prime Minister, he is entitled to immunity from suit under the FSIA. "The FSIA provides the sole source of subject matter jurisdiction in suits against a foreign state," subject to certain exceptions. *Velasco*, 370 F.3d at 397 (*citing Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-39 (1989)). Section 1330(a) of Title 28, United States Code, provides that

> [t]he district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as to any . . . claim for relief in personam with respect to which the foreign state is not entitled to immunity under sections 1605-1607 of this title or under any applicable international agreement.

Section 1604 of Title 28 provides that "[s]ubject to existing international agreements to which the United States [was] a party at the time of enactment of [the] Act[,] a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." Neither party argues that an

exception is applicable.[12] Accordingly, if Samantar's actions are shielded by the FSIA, the Court lacks subject matter jurisdiction and must dismiss the claims against him.

"Although the statute is silent on the subject, courts have construed foreign sovereign immunity to extend to an individual acting in his official capacity on behalf of a foreign state." *Velasco*, 370 F.3d at 398. Stated another way, "[c]laims against the individual in his official capacity are the practical equivalent of claims against the foreign state." *Velasco*, 370 F.3d at 398 (*citing Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1101 (9th Cir. 1990) (interpreting § 1603(b) to include individuals sued in their official capacity)). Immunity is not provided under the FSIA, however, to "an official who acts beyond the scope of his authority." *Velasco*, 370 at 398 (*citing Chuidian*, 912 F.2d at 1106).

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[12] Section 1605 provides certain general exceptions to the applicability of the FSIA, including: waiver under § 1605(a)(1); disputes arising from commercial activities of a foreign state under § 1605(a)(2); disputes arising from certain tortious acts committed within the United States under § 1605(a)(5); and certain actions by state sponsors of terrorism under § 1605(a)(7).

It should also be noted that the plaintiffs do not argue in the alternative that Somalia does not qualify as a "state" for purposes of the FSIA. *See e.g., Ungar v. Palestine Liberation Organization*, 402 F.3d 274, 288 (1st Cir.2005) (holding that Palestine is not a state because it does not meet the accepted definition of a state as an "entity that has a defined territory and a permanent population under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.").

B. Application of the Foreign Sovereign Immunities Act

The plaintiffs argue that the FSIA does not apply because Samantar acted outside the scope of his authority. Specifically, they maintain that the determinative issue is whether the allegation that Samantar acted contrary to international norms is conclusive as to whether he acted beyond the scope of his authority and is therefore not covered by the FSIA. Because this issue has not been decided by the Fourth Circuit, the Court has looked to its sister courts to determine the issue.

Two recent district court cases involving facts that closely parallel the facts of the instant action, one cited by the defendant and one decided after briefing was completed, lead the Court to conclude that it lacks subject matter jurisdiction. *See Belhas v. Ya'Alon*, 466 F.Supp.2d 127 (D.D.C.2006); *Matar v. Dichter*, 2007 WL 1276960 (S.D.N.Y. May 2, 2007). In *Belhas*, citizens of Lebanon sued former Israeli general Moshe Ya'Alon pursuant to the ATCA and the TVPA, alleging that the bombing of Qana, within southern Lebanon, by the Israeli military in April 1996 constituted war crimes; extrajudicial killing; crimes against humanity; and cruel, inhuman, or degrading treatment or punishment.[13] The defendant was a retired Israeli general who was the head of the Israeli Army Intelligence at the time of the Qana bombing. He moved to dismiss on the grounds that the suit was barred by the FSIA, presented non-justiciable political questions, and was

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[13] The bombing was the result of the conflict between Israel and Hezbollah.

barred by the act of state doctrine. The defendant in *Belhas* presented a letter from the State of Israel, which described the lawsuit as challenging "sovereign actions of the State of Israel, approved by the government of Israel in defense of its citizens against terrorist attacks[,] and opines that [t]o allow a suit against these former officials is to allow a suit against Israel itself." 466 F.Supp.2d at 129 (internal quotations omitted). After analyzing the FSIA, the district court characterized the central issue as: "If General Ya'alon's actions were taken in an official capacity, he therefore was acting as an agency or instrumentality of the foreign state, and is immune from suit under the FSIA." *Id.* at 130. Citing plaintiffs' allegations that the defendant "had command responsibility for the attack," "participated in the decision," and was "acting under color of Israeli law," *id.* at 130-31, and the lack of allegations that the defendant was acting in his personal capacity or that his activities were private in nature, the court concluded that it "is undisputed that General Ya'alon was acting in his official capacity with respect to the events underlying this lawsuit," and was therefore entitled to immunity under the FSIA. *Id.* at 131.

Similar to the plaintiffs in the case before the Court, the plaintiffs in *Belhas* argued that the TVPA "provides liability for extrajudicial killing even if Defendant's conduct was authorized" by the Israeli government because the FSIA "does not apply to those acting outside the scope of their authority under the applicable domestic or international law, and does not preclude claims against officials for war crimes, crimes against humanity, extrajudicial killing, and cruel, inhuman, or degrading treatment or punishment." *Id.* The *Belhas* court rejected the

first line of reasoning by concluding that "there is no basis in this case to treat individual officials differently from foreign states themselves under the FSIA." *Id.* (*citing Jacobsen v. Oliver*, 451 F.Supp.2d 181, 195 (D.D.C.2006) ("Because Section 1603(a) defines 'foreign state' as including 'agencies and instrumentalities,' the distinction between the two is only relevant in the FSIA where explicitly drawn[,] such as in Section 1606 and in Section 1608.")). The court further reasoned that this conclusion was not an implicit bar to suit against a foreign official acting on behalf of a foreign state, because "[i]n a case where an FSIA exception applies . . . a foreign official could be sued under the TVPA." *Id.*

As to the plaintiffs' second argument, that the defendant's actions could not be considered within the scope of his authority because they violated norms of international law and were war crimes, crimes against humanity and constituted prohibited extrajudicial killing, the court held that because the FSIA is the sole basis for obtaining jurisdiction over a foreign state in United States courts, "[t]here is no authority for the proposition that the TVPA, the [ATCA] or any other statute trumps or preempts the FSIA." *Id.* at 132. The court further declined to differentiate between individual defendants and foreign states on the basis that "the D.C. Circuit has squarely held that foreign officials acting in their official capacities on behalf of foreign states are agencies and instrumentalities of foreign states, and thus are within the definition of a foreign state under the FSIA." *Id.* at 133 (*citing Jungquist*, 115 F.3d at 1027).

Similarly, in *Matar*, a case not briefed by either party because it was decided a week after the hearing, plaintiffs sued a former director of the Israeli General Security Service under the ATCA and the TVPA, alleging, *inter alia*, that he was responsible for war crimes; crimes against humanity; cruel, inhuman or degrading treatment or punishment; extrajudicial killings; and other crimes, in that he authorized, planned and directed military personnel in the bombing of a residential neighborhood in Gaza City and developed, implemented, and escalated Israel's targeted killing policy. 2007 WL 1276960, at *1 (internal quotations omitted). Shortly after the suit was filed, the then-Israeli ambassador to the United States conveyed to the State Department Israel's concerns regarding the "fundamental inappropriateness" of the action. *Id.* Specifically, the letter stated that "anything Mr. Dichter . . . did in connection with the events at issue in the suit [ ] was in the course of [his] official duties, and in furtherance of official policies of the State of Israel." *Id.* at *2. The defendant moved to dismiss the case on the grounds that he was immunized from suit under the FSIA. At that point the court invited the State Department to submit its views. In response, the State Department submitted its own Statement of Interest, which warned that "any refusal by U.S. courts to grant immunity to foreign officials for their official acts could seriously harm U.S. interests." *Id.*

In analyzing whether the FSIA was applicable, the court first determined that "individuals acting pursuant to their official capacity are eligible for immunity under the FSIA." *Id.* at *6. The court then came to the central question posed to this Court and

the *Belhas* court: whether the FSIA applied to this particular defendant's actions. First, the court concluded that "[p]laintiffs unquestionably sue Dichter in his official capacity [because] [n]othing in the Complaint permits an inference that Dichter's alleged conduct was 'personal and private in nature.'" *Id.* (*citing Leutwyler v. Al-Abdullah*, 184 F.Supp.2d 277, 287 (S.D.N.Y.2001); *Belhas*, 466 F.Supp.2d at 130-131). As further evidence that the defendant acted within the scope of his official duties, the court cited the State of Israel's letter, which was assigned "great weight." *Matar*, 2007 WL 1276960, at *6 ("Courts assign 'great weight' to the opinion of a sovereign state regarding whether one of its officials was acting within his official scope.") (*citing In re Terrorist Attacks of Sept. 11, 2001*, 392 F.Supp.2d 539, 551 (S.D.N.Y.2005); *Rein v. Rein*, 1996 WL 273993, at *2 (S.D.N.Y. May 23, 1996)).

Plaintiffs countered, however, as did the plaintiffs in *Belhas* and in this civil action, that the FSIA does not apply to the types of allegations in the complaint because those acts are necessarily beyond the scope of an official's lawful authority. The court rejected that argument, finding that "[n]one of the cases cited by the Plaintiffs involved a situation where, as here, the foreign government had expressly ratified the defendant's actions and affirmed that the defendant was acting pursuant to his official duties." *Id.* (distinguishing *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1470-72 (9th Cir.1994) (holding that defendant's acts were "taken without official mandate" where the Philippine government conceded that "Marcos may be held liable for acts done as President"); *Doe v. Qi*, 349 F.Supp.2d 1258, 1287 (N.D.Cal.2004) (no immunity where China "appears

to have covertly authorized but publicly disclaimed the alleged human rights violations . . . by Defendants Liu and Xia and asserts that such violations are in fact prohibited by Chinese law"); *Cabiri v. Assasie-Gyimah*, 921 F.Supp. 1189, 1197 (S.D.N.Y.1996) (defendant "[did] not claim that the acts of torture he is alleged to have committed fall within the scope of his authority"); *Xuncax v. Gramajo*, 886 F.Supp. 162, 176 n. 10 (D.Mass.1995) ("There is no suggestion that either the past or present governments of Guatemala characterize the actions alleged here as 'officially' authorized.")). Finally, the plaintiffs argued that immunizing officials under the FSIA would conflict with the language of the TVPA. The court dismissed this argument, citing *Belhas* for the proposition that a foreign state official acting in his official capacity could be sued under the TVPA "where an FSIA exception applies." *Id.* at *8.

Due to the timing of the *Matar* opinion, the plaintiffs obviously were not able to respond to it. However, they did argue that *Belhas*, a nearly identical case, "is against the weight of authority[,] does not even reference the relevant legislative history of the TVPA," and therefore should be given little weight by this Court. The factual similarities between the instant action and *Belhas* and *Matar*, however, cannot be ignored. Like the defendants in *Belhas* and *Matar*, Samantar is a retired military leader. Samantar is perhaps entitled to even more deference because he was Minister of Defense, a cabinet level position, and then Prime Minister, during the alleged events. There is also no doubt that Samantar is being sued in his capacity as a former Minister of Defense and Prime Minister. The

complaint repeatedly states that "Defendant Samantar, as Minister of Defense," or that "Defendant, as Prime Minister," had the power to take certain actions. Compl. ¶¶ 66-68, 71-73, 77. As in the *Belhas* and *Matar* complaints, the complaint at issue does not allege that Samantar was acting on behalf of a personal motive or for private reasons.

Moreover, the Somali Transitional Federal Government, which is supported and recognized by the United States as the governing body in Somalia, has sent two letters to the State Department regarding this case.[14] The first letter, dated February 17, 2007, is from the TFG's Deputy Prime Minister and Acting Prime Minister, Salim Alio Ibro. This letter provides, *inter alia*,

> In the previous letter, our Government also expressed its concern over the prosecution in a U.S. court of a lawsuit against a former Prime Minister and head of Government Mohamed Ali Samantar.

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[14] On June 27, 2007, the plaintiffs supplemented their pleadings on this matter with two letters from representatives from the Republic of Somaliland, intended to counter the letters submitted by the defendant. These letters, dated March 3, 2005, and June 2, 2007, were sent to Secretary Rice at the State Department and reinforce Somaliland's support for the plaintiffs' claims and suggest that the "opportunity for accountability in the United States will help support efforts of democratic transition and promote reconciliation in the region, rather than hinder those efforts." *See* Pl.'s Supp. Filing Ex. 2. To the extent that these letters are intended to provide a counterpoint to the Somalia TFG letters, they fall short. Plaintiffs have not established that Somaliland is an independent nation, nor that it is a foreign state recognized by the United States. Accordingly, these letters are not entitled to the same level of deference as are the letters produced on behalf of the Somalia TFG.

> We requested that your Department initiate a statement of interest to request that the court dismiss this lawsuit as a violation of Mr. Samantar's immunity and as a threat to the reconciliation efforts then underway in Somalia.
>
> We recently learned that the court is placing the lawsuit (*Yousuf v. Samantar*, No. 1:04 CV 1360, U.S. Dist. Ct. for the E. Dist. of Va.) back on its active docket. This event makes an expression of such interest that much more important.
>
> We wish to indicate that the actions attributed to Mr. Samantar in the lawsuit in connection with the quelling of the insurgencies from 1981 to 1989 would have been taken by Mr. Samantar in his official capacities and to reaffirm Mr. Samantar's entitlement to sovereign immunity from prosecution for those actions.
>
> We also wish to reemphasize the potential danger to the reconciliation process in Somalia of a lawsuit that would hold a flame to past events and revive old hostilities.

Mot. to Dismiss, Ex. 2. A second letter was presented to the Court on April 27, 2007. This letter, written by Prime Minister Ali Mohammed Gedi, reiterated the Somali TFG's position that Samantar was acting within the scope of his authority during the events at issue. Specifically, the letter, dated April 26, 2007, was intended to "reaffirm Mr. Samantar's entitlement to sovereign immunity" for the actions alleged in the complaint, as they "would have been taken by Mr. Samantar in his official capacities." These letters are entitled to "great weight" and persuade the Court that dismissal is appropriate. *See Matar*, 2007 1276960, at *6.

C. Legislative History of the TVPA

As did the plaintiffs in *Matar*, the plaintiffs in the instant civil action cite the legislative history of the TVPA in arguing that the TVPA clearly forecloses dismissal on sovereign immunity grounds. The legislative history of the TVPA, however, does not necessarily direct the Court to this conclusion. That history provides that the purpose of the TVPA "is to provide a Federal cause of action against any individual who, under actual or apparent authority or under color of law of any foreign nation, subjects any individual to torture or extrajudicial killing." S. REP. NO. 102-249, at *3 (1991). The TVPA was also intended to "enhance the remedy already available" under the ATCA by extending a civil remedy to U.S. citizens who may have been tortured abroad. *Id.* at *5. However, as the Senate Report makes clear, "the legislation uses the term 'individual' to make crystal clear that foreign states or their entities cannot be sued under this bill under any circumstances . . . the TVPA is not meant to override the Foreign Sovereign Immunities Act of 1976." *Id.* at *7; *see also* H.R. REP. NO. 102-367, at 88 (1991) ("The TVPA is subject to restrictions in the Foreign Sovereign Immunities Act of 1976."). Nor is the TVPA intended to "override traditional diplomatic immunities which prevent the exercise of jurisdiction by U.S. courts over foreign diplomats." *Id.*; *see also* H.R. REP. NO. 102-367, at 88 ("While sovereign immunity would not generally be an available defense, nothing in the TVPA overrides the doctrines of diplomatic and head of state immunity.").

Furthermore, although the legislative history states that the FSIA and traditional diplomatic

immunities are not intended "to provide former officials with a defense to a lawsuit," it also clarifies how former officials can successfully invoke the FSIA and avoid liability under the TVPA. Specifically, it states that,

> To avoid liability by invoking the FSIA, a former official would have to prove an agency relationship to a state, which would require that the state "admit some knowledge or authorization of relevant acts." 28 U.S.C. 1603(b). Because all states are officially opposed to torture and extrajudicial killing, however, the FSIA should *normally* provide no defense to an action taken under the TVPA against a former official.

S. REP. NO. 102-249, at *8 (emphasis added). According to this legislative history, in those cases where a state "admit[s] some knowledge or authorization of relevant acts," the FSIA applies and that former official should be entitled to immunity. Such is the case before the Court. The Somali TFG, which is the only Somali government supported and recognized by the United States, has unequivocally stated that "the actions attributed to Mr. Samantar in the lawsuit in connection with the quelling of the insurgencies from 1981 to 1989 would have been taken by Mr. Samantar in his official capacities." Accordingly, the government of Somalia has ratified the actions of Samantar, thereby shielding his actions under the cloak of immunity provided by the FSIA. This result is in accord with the legislative history of the TVPA and President George H.W. Bush's signing statement that accompanies the TVPA:

> I note that H.R.2092 does not help to implement the Torture Convention and does present a number of potential problems about which the Administration has expressed concern in the past. This legislation concerns acts of torture and extrajudicial killing committed overseas by foreign individuals. With rare exceptions, the victims of these acts will be foreign citizens. There is thus a danger that U.S. courts may become embroiled in difficult and sensitive disputes in other countries, and possibly ill-founded or politically motivated suits, which have nothing to do with the United States and which offer little prospect of successful recovery. Such potential abuse of this statute undoubtedly would give rise to serious frictions in international relations and would also be a waste of our own limited and already overburdened judicial resources . . . . The expansion of litigation by aliens against aliens is a matter that must be approached with prudence and restraint. It is hoped that U.S. courts will be able to avoid these dangers by sound construction of the statute and the wise application of relevant legal procedures and principles.

1992 U.S.C.C.A.N. 91.

D. Cases Holding that Official Acted Outside the Scope of his Lawful Authority

The plaintiffs rely on case law from the Ninth Circuit to contend that some courts have found a defendant's actions to be outside the scope of his authority and therefore amenable to suit under the TVPA and the ATCA, and argue that this Court should take the same approach. Both cases concerned actions brought against the former Philippine President Ferdinand Marcos and his

daughter, Imee Marcos-Manotoc, and alleged that during Ferdinand Marcos' tenure as president of the Philippines, up to 10,000 people were tortured, summarily executed, or disappeared at the hands of the military intelligence personnel, which operated under the authority of Marcos and his daughter Imee Marcos-Manotoc. After the two fled to Hawaii, numerous lawsuits were filed by plaintiffs claiming that they had been arrested and tortured, or were related to people arrested, tortured, and executed. *See Trajano v. Marcos (In re Estate of Ferdinand Marcos, Human Rights Litigation)*, 978 F.2d 493 (9th Cir.1992); *Hilao v. Marcos (In re Estate of Ferdinand Marcos, Human Rights Litigation)*, 25 F.3d 1467 (9th Cir.1994).

Both *Trajano* and *Hilao* are easily distinguishable from the case before the Court. In *Trajano*, the defendant, by defaulting, was deemed to have admitted the allegations in the complaint and to have conceded that she acted outside the scope of her authority. In *Hilao*, the Philippine government affirmed that Marcos' actions were taken outside the scope of his authority, and stated that foreign relations would "not be adversely affected" if the case were to continue.[15] That affirmation contrasts

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[15] The Minister of Justice of the Philippine government had written a letter asserting that Marcos could be held liable for the acts done as President and that "the government or its officials may not validly claim state immunity for acts committed against a private party in violation of existing law." *Hilao*, 25 F.3d at 1471. The Philippine government also filed an *amicus curiae* brief in related litigation stating that "foreign relations with the United States will not be adversely affected if these human rights claims against Ferdinand Marcos are heard in U.S. courts." *Id.* (emphasis in original).

directly with the statement provided by the Somali TFG in this case, which clearly states that foreign relations would be adversely affected by this litigation, and that if the litigation progressed, it could inflame already high tensions in the region.

E. Jus Cogens[16]

Although the plaintiffs do not attempt to argue that violations of *jus cogens* norms constitutes an implied waiver of sovereign immunity under § 1605(a)(1), several circuit courts addressing similar issues have held that they do not. *See Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1156 (7th Cir.2001) ("We conclude that Congress did not create an implied waiver exception to foreign sovereign immunity under the FSIA for *jus cogens* violations."); *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 245 (2d Cir.1996) ("Our rejection of the claim that a *jus cogens* violation constitutes an implied waiver within the meaning of the FSIA . . . rests on our understanding that Congress did not intend the implied waiver exception

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Although the Ninth Circuit did not discuss it, presumably such a letter would also act as an express waiver of sovereign immunity under § 1605(a)(1), which would also subject Marcos to the jurisdiction of the federal court.

[16] The Vienna Convention on the Law of Treaties defines a *jus cogens* norm, also known as a "peremptory norm" of international law, as a "'a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'" *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir.1992) (*quoting* Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 332, 8 I.L.M. 679).

of section 1605(a)(1) to extend so far, however desirable such a result might be."); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir.1992) ("While we agree with the Sidermans that official acts of torture of the sort they allege Argentina to have committed constitute a *jus cogens* violation, we conclude that *Amerada Hess* forecloses their attempt to posit a basis for jurisdiction not expressly countenanced by the FSIA.").

V. CONCLUSION

The allegations in the complaint clearly describe Samantar, at all relevant times, as acting upon the directives of the then-Somali government in an official capacity, and not for personal reasons or motivation. To allow such a suit to proceed would, in the words of the *Chuidian* court, "amount to a blanket abrogation of foreign sovereign immunity by allowing litigants to accomplish indirectly what the Act barred them from doing directly." 912 F.2d at 1102. "The rule that foreign states can be sued only pursuant to the specific provisions of sections 1605-07 would be vitiated if litigants could avoid immunity simply by recasting the form of their pleadings [by naming an individual official of the government instead of the foreign state itself]." *Id.*

Unlike every case cited by the plaintiffs, the Somalia TFG has not disavowed the actions of the defendant. Nor has it implied that the suit could go forward without affecting international relations and the current situation in Somalia. Rather, it has explicitly stated that the actions of the defendant were taken in his official capacity. Furthermore, the recent opinions in *Belhas* and *Matar* so closely parallel the instant action that their reasoning is

informative and persuade the Court that dismissal of the civil action is the appropriate resolution.

In finding that Samantar is immune from liability in these proceedings under the FSIA, the Court does not intend to minimize the gravity of the plaintiffs' allegations. Violations of human rights by governments and their agents should not be tolerated by civilized societies. However, a court must proceed cautiously in this area to avoid interfering with delicate international relations. As the D.C. Circuit recognized in *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C.Cir.1994), in the context of evaluating why violations of *jus cogens* norms did not constitute an implied waiver of sovereign immunity under § 1605(a)(1):

> We think that something more nearly express is wanted before we impute to the Congress an intention that the federal courts assume jurisdiction over the countless human rights cases that might well be brought by the victims of all the ruthless military juntas, presidents-for-life, and murderous dictators of the world, from Idi Amin to Mao Zedong. Such an expansive reading of § 1605(a)(1) would likely place an enormous strain not only upon our courts but, more to the immediate point, upon our country's diplomatic relations with any number of foreign nations. In many if not most cases the outlaw regime would no longer even be in power and our Government could have normal relations with the government of the day—unless disrupted by our courts, that is.

Id. at 1175 n. 1.

For the above stated reasons, Samantar is entitled to sovereign immunity under the FSIA for the acts he

undertook on behalf of the Somali government. Accordingly, the Court does not have subject matter jurisdiction over the plaintiffs' claims, brought under the TVPA and the ATCA, and Defendant Samantar's Motion to Dismiss Second Amended Complaint has been granted. An appropriate order will issue with this Memorandum Opinion.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

BASHE ABDI YOUSUF, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	1:04cv1360
	)	
MOHAMED ALI SAMANTAR,	)	
	)	
Defendant.	)	

ORDER

For the reasons stated in open court and in the accompanying Memorandum Opinion, the defendant's Motion to Dismiss Second Amended Complaint has been GRANTED, and it is hereby

ORDERED that the Clerk enter judgment in the defendant's favor pursuant to Fed. R. Civil P. 58.

The Clerk is directed to forward copies of this Order and the accompanying Memorandum Opinion to counsel of record.

Entered this 1st day of August, 2007.

/s/

Leonie M. Brinkema
United States District Judge

Alexandria, Virginia

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

BASHE ABDI YOUSUF, et al., Plaintiffs, vs. MOHAMED ALI SAMANTAR, Defendant.	Civil Action No. 1:04cv1360 Alexandria, Virginia April 27, 2007 10:40 a.m.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE
LEONIE M. BRINKEMA
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFFS: ROBERT R. VIETH, ESQ.
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OFFICIAL COURT REPORTER:	ANNELIESE J. THOMSON, RDR, CRR U.S. District Court Fifth Floor 401 Courthouse Square Alexandria, VA 22314 (703) 299-8595

COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

PROCEEDINGS

THE CLERK: Civil Action 04cv1360, Bashe Abdi Yousuf, et al. v. Mohamed Ali Samantar. Would counsel please note their appearances for the record.

MR. GOLDBERG: Good morning, Your Honor. Fred Goldberg for the defendant.

THE COURT: Mr. Goldberg.

MR. VIETH: Good morning, Your Honor. Robert Vieth for the plaintiffs.

THE COURT: All right, this matter comes before the Court on the defendant's motion to dismiss, and we've had a chance to review this motion with great

care. It's actually a motion to dismiss the second amended complaint.

There are a significant number of complex legal arguments that are raised in the defendant's motion. I know that plaintiff has requested perhaps some additional time to address the statute of limitations argument and whether or not the plaintiffs could have brought similar claims in the Italian court system within the time period that was within the statute, but I don't think the statute of limitations issue is really the dispositive issue in this case.

It strikes this Court that under the Foreign Sovereign Immunities Act, the record that's established at this point before this Court is more than sufficient to support the defendant's motion that this case must be dismissed.

As I've expressed to you many times before, Mr. Vieth, I've been concerned about this particular case, first of all, because of allegations that were raised either in this motion to dismiss or in the previous one that there were significant political motivations for the particular litigation at this time and that this is such a very sensitive time in that part of the world, with Somalia being in such chaos and efforts being made through a transitional federal government to try to get a unified governmental system there so that what is going on now can be quelled.

You know that we had terrible problems in the past figuring out how in the world there could be a reasonable discovery in this case given the chaos in that part of the world, and I understand you had pending before Judge Poretz a motion for a protective order addressing some of these issues, and that is, trying to figure out what you were going to do about

arranging for depositions, because there's no way in which depositions could be taken in Somalia, Ethiopia presents similar types of problems, and the American judicial process can't just go into any country without the permission of the sovereign. We would have needed to go through letters rogatory and other diplomatic channels.

There are problems in bringing foreigners into the United States. Some of the witnesses might very well not be able to come here and might not want to come here.

So there are various logistical problems that this case presents that most civil cases in our courts do not present, but the overwhelmingly compelling argument, it seems to me, that I don't think the plaintiff can get around are the concerns under the Foreign Sovereign Immunities Act about the immunity that would apply to someone in this defendant's position.

We have in the record a letter dated February 17, 2007, from Salim Alio Ibro, who is identified as the Acting Prime Minister for the Transitional Federal Government of the Somali Republic. This is a letter written to Secretary of State Rice specifically addressing this case and indicating that, "We wish to indicate that the actions attributed to Mr. Samantar in the lawsuit in connection with the quelling of the insurgencies from 1981 to 1989 would have been taken by Mr. Samantar in his official capacities and to reaffirm Mr. Samantar's entitlement to sovereign immunity from prosecution for those actions."

And then the next paragraph, which again troubles this Court or concerns us even more, "We also wish to reemphasize the potential danger to the

reconciliation process in Somalia of a lawsuit that would hold a flame to past events and revive old hostilities."

Faced with what I think is the overwhelming case law certainly in the Fourth Circuit, the Fourth Circuit recognizes that the Foreign Sovereign Immunities Act can apply to individual members of the government and provide them with immunity, the D.C. Court, Judge Friedman's decision recently involving the government of Israel is right on point with the facts, I think, and the allegations of this case, also holding that immunity would apply, those cases convince me that the statute does apply and immunity would apply here, but even if it didn't, I think the compelling special political circumstances that are raised in this letter from the transitional government coupled with the horrendously difficult hurdles to having any kind of reasonable federal civil discovery in this case make this an untenable lawsuit.

That's giving you an uphill battle, Mr. Vieth, but is there anything you wanted to put on the record that would, you think, dissuade me from the direction in which I'm about to go?

MR. VIETH: Thank you for the opportunity to speak, Your Honor. First, we, we do disagree with what appears to be Your Honor's interpretation of the Foreign Sovereign Immunities Act. The Fourth Circuit has held that it does apply to individuals, but there is case after case after case holding individuals liable, individuals who are acting under color of law, because that is required really to get in the door on 90 percent of these claims.

We do think that the Torture Victim Protection Act would have been a meaningless act by Congress if anyone under color of law was—who acted under color of law was automatically immune.

Now, we have—we put this in our briefs, and I know Your Honor has carefully read the briefs, so I don't want to stand here and repeat myself, but I do think—repeat what I said in the briefs, but I do think that the legislative history together with case after case after case holding individuals liable tend to show that the Foreign Sovereign Immunities Act does not protect defendants in the position of Mr. Samantar.

Your Honor, it's one thing to allow a state to have immunity under the Foreign Sovereign Immunities Act. It's another thing to grant immunity to an individual who committed torture or human rights abuses on behalf of that state to be immune when he moves to this country to live thereafter, and that's the crucial distinction, Your Honor, as well as the distinction between acting in official capacity and merely acting under color of law.

Your Honor, the—we do dispute the force and perhaps even the validity of the letter from the TFG that Your Honor has. First, I don't believe the—and TFG is the Transitional Federal Government. I don't believe that government is recognized by the United States. I think the State Department has had that letter for some time and has not requested that this Court take any action on it. So I don't believe that should, frankly, play much of a role in Your Honor's consideration of the motion.

THE COURT: Well, it's interesting that in today's Washington Post, in the first section, there's a large article about Somalia and Ethiopia and the incredibly

unstable situation there, likening it to a potential new Iraq. It clearly states, and I guess the Washington Post is not legal authority, but it just heightens the fact that the political background against which this lawsuit is to some degree positioned is incredibly incendiary.

I mean, it's much more incendiary than, for example, the political situation at issue in Judge Friedman's case, and that just reinforces my view that this—and although there may not be a formal recognition of the transitional authority, everything that you see at least in the public media indicates that the United States has publicly indicated it backs that authority. I don't think that that would be an incorrect statement of the situation.

And why the State Department didn't have the courtesy of responding to this Court, giving all of us some indication, is beyond me. I actually had considered issuing something myself directly to the department but decided after particularly looking at the recent D.C. case and the briefs of the parties that I would go forward with what I've got, but I was not pleased that they didn't have the courtesy of responding, because I think they should have weighed in at some point.

Yes, Mr. Vieth?

MR. VIETH: May I say just one more thing about the discovery problems, Your Honor?

THE COURT: Yes.

MR. VIETH: We do think they are surmountable, by no means insurmountable. Ms. Lee, whom Your Honor just admitted to this Court, returned

yesterday from Somalia. She was in Hargeisa. This week, we ran a video test that worked.

We also—and we were planning to bring that to the Court's attention through a more formal motion—we did file a motion for a protective order. There's no notice of deposition filed. We wanted to be up front about our diligence on these issues with the Court.

But we also are seriously exploring the possibility of doing depositions in Dubai, where I don't think we run into serious logistical problems. I think it's feasible. It is one of the countries to which people from Somalia may travel with relative ease, and it's a modern city, with all of the technology one could ask for.

So I know that's—I just wanted to say that to the extent that's playing a role in Your Honor's thinking, I understand—

THE COURT: Did you have the permission of the Dubai authorities to conduct pretrial discovery there?

MR. VIETH: We have been in touch with the United States State Department and with the consulate in Dubai. I can't recall—and I personally was not making these phone calls—I don't recall if we actually spoke to the embassy, which is in Abu Dhabi rather than Dubai, but I know our office talked directly to the consulate in Dubai, and it—the information we have received is for voluntary depositions where no subpoena is required, it's relatively easy.

We are—this is actually a series of conversations, and we're hoping to continue to engage with the right people there, but the preliminary indication at least

is it should not be too difficult if we can get the people there, and we think we can get them there.

THE COURT: All right.

MR. VIETH: Thank you, Your Honor. Although I, I do understand what Your Honor has said, and I do think Judge Friedman's case is wrongly decided, I will say that. I could try to distinguish it, but it's, frankly, not very persuasive. I think it's wrongly decided, and Your Honor—

THE COURT: And I know it's on appeal; I understand that.

MR. VIETH: And it is on appeal. Thank you, Your Honor.

THE COURT: All right. Mr. Goldberg, was there anything that you wanted to add to the record? What I will do because, obviously, it's a very significant issue, I want to give you a written opinion. I wanted you to know what the ruling is, and that will be the ruling as of today, to be followed up with an opinion, and so the time to appeal will be stayed until such time as you get the more detailed reasoning from the Court.

MR. GOLDBERG: Yes, Your Honor, thank you. I'd like to add two things. The first is that we would suggest that Hargeisa is not an acceptable location from which to conduct discovery, as it's in Somaliland, which is not recognized by the United States.

I don't see how we could have a judicial proceeding emanating from a country we don't recognize. I don't know who would administer an oath that would be sufficient. I don't know that it would be recognized by this Court or even condoned

by this Court for a location from which to conduct discovery. That's one issue.

The other is, Your Honor, yesterday evening, I received a follow-up fax copy of a letter—a new letter to Dr. Rice, Secretary of State Rice, from the transitional government, this time from the prime minister, Mr. Ghedi, President—Prime Minister Ghedi, which reiterates some of the information that was in the last letter but includes a paragraph that says, "Even though state collapse and anarchy took place in our country, nevertheless, the diplomatic immunities of the then Somali government officials have not been removed."

And that paragraph was not in the original letter. I'd like to add that for the record. I sent a copy last night when I received it to Mr. Vieth. It only came in at about 4:15, so I couldn't get it to the Court.

THE COURT: All right, if you'd hand it over to the court security officer? We'll make it a part of the file.

So as I said, Gentlemen, I'm granting the motion to dismiss, dismissing the case at this time. I'm taking a little time to get the opinion out, because I want it to be thorough. Obviously, it will invite the Fourth Circuit to perhaps create new law in this Circuit.

And I want to make sure it's understood clearly that the allegations are obviously very serious. The kind of conduct that is described in the complaint is conduct that civilized societies ought not to tolerate, but that's not this Court's issue. I have legal issues that I think bar this lawsuit.

I think Congress has spoken. If Congress wants to clarify the law, it can do so. It knows how to do that.

But I think that the very careful reasoning of Judge Friedman is very sound reasoning. I will most likely adopt a good deal of it myself in writing this opinion. Thank you.

MR. GOLDBERG: Thank you, Your Honor.

MR. VIETH: Thank you, Your Honor.

(Which were all the proceedings had at this time.)

CERTIFICATE OF THE REPORTER

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter.

_____

Anneliese J. Thomson

FILED: February 2, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-1893
(1:04-cv-01360-LBM)

BASHE ABDI YOUSUF; OFFICER JOHN DOE 1; JANE DOE 1; JOHN DOE 2; JOHN DOE 3; JOHN DOE 4; AZIZ DERIA,

Plaintiffs - Appellants

v.

MOHAMED ALI SAMANTAR,

Defendant - Appellee

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TRAUMA; PROGRAM FOR TORTURE VICTIMS; ROCKY MOUNTAIN SURVIVORS CENTER; SURVIVORS OF TORTURE, INTERNATIONAL; THE SHALOM CENTER; TORTURE ABOLITION AND SURVIVORS SUPPORT COALITION INTERNATIONAL; WORLD ORGANIZATION FOR HUMAN RIGHTS USA; INTERNATIONAL RIGHTS ADVOCATES; INTERNATIONAL HUMAN RIGHTS CLINIC, Human Rights Program of Harvard Law School; UNITED STATES MEMBER OF CONGRESS AND LAW PROFESSORS,

Amici Supporting Appellant

ORDER

The Court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Traxler, Judge King and Judge Duncan.

For the Court

/s/ Patricia S. Connor, Clerk

Foreign Sovereign Immunities Act of 1976
Excerpts
United States Code
Title 28

§ 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for

the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

§ 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or

particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(7) Repealed. Pub.L. 110-181, Div. A, § 1083(b)(1)(A)(iii), Jan. 28, 2008, 122 Stat. 341

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is

asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be

subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

(e), (f) Repealed. Pub.L. 110-181, Div. A, Title X, § 1083(b)(1)(B), Jan. 28, 2008, 122 Stat. 341

(g) Limitation on discovery.—

(1) In general.—(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for section 1605A, the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date

on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) Sunset.—(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would—

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) Evaluation of evidence.—The court's evaluation of any request for a stay under this

subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) Bar on motions to dismiss.—A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) Construction.—Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

§ 1605A. Terrorism exception to the jurisdictional immunity of a foreign state

(a) In general.—

(1) No immunity.—A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

(2) Claim heard.—The court shall hear a claim under this section if—

(A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject

to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or

(III) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) was filed;

(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred—

(I) a national of the United States;

(II) a member of the armed forces; or

(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the

claim in accordance with the accepted international rules of arbitration; or

(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

(b) Limitations.—An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) not later than the latter of—

(1) 10 years after April 24, 1996; or

(2) 10 years after the date on which the cause of action arose.

(c) Private right of action.—A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to—

(1) a national of the United States,

(2) a member of the armed forces,

(3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or

(4) the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

(d) Additional damages.—After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

(e) Special masters.—

(1) In general.—The courts of the United States may appoint special masters to hear damage claims brought under this section.

(2) Transfer of funds.—The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph (1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

(f) Appeal.—In an action brought under this section, appeals from orders not conclusively ending the

litigation may only be taken pursuant to section 1292(b) of this title.

(g) Property disposition.—

(1) In general.—In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the effect of establishing a lien of lis pendens upon any real property or tangible personal property that is—

(A) subject to attachment in aid of execution, or execution, under section 1610;

(B) located within that judicial district; and

(C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.

(2) Notice.—A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

(3) Enforceability.—Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title.

(h) Definitions.—For purposes of this section—

(1) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages;

(3) the term "material support or resources" has the meaning given that term in section 2339A of title 18;

(4) the term "armed forces" has the meaning given that term in section 101 of title 10;

(5) the term "national of the United States" has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

(6) the term "state sponsor of terrorism" means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism; and

(7) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).

§ 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an

agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

§ 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit,

together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and

complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made—

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such

default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

Alien Tort Statute
United States Code
Title 28

§ 1350. Alien's action for tort

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

Torture Victim Protection Act of 1991
United States Code
Title 28, Section 1350
Note

Section 1. Short Title.

This Act may be cited as the "Torture Victim Protection Act of 1991".

Sec. 2. Establishment of civil action.

(a) Liability.—An individual who, under actual or apparent authority, or color of law, of any foreign nation—

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

(b) Exhaustion of remedies.—A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

(c) Statute of limitations.—No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

Sec. 3. Definitions.

(a) Extrajudicial killing.—For the purposes of this Act, the term "extrajudicial killing" means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted

court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

(b) Torture.—For the purposes of this Act—

(1) the term "torture" means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from—

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the

> administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

[Quotation marks omitted.]

OPPOSITION BRIEF

(2)

No. 08-1555

Supreme Court, U.S.
FILED
AUG 28 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

MOHAMED ALI SAMANTAR,

Petitioner,

v.

BASHE ABDI YOUSUF, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In an action filed under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, and the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350 note, against a natural person who resides in the United States and who is a former official of a failed state, which action seeks damages from that individual for acts of torture, rape, and extrajudicial killings overseen by him under color of law of a foreign state, whether:

1. The Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602-1611, extends a foreign state's immunity to an individual official of that state; and

2. Assuming the FSIA applies to individual officials, the law extends immunity to an individual who is no longer an official of a foreign state at the time the complaint is filed.

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JURISDICTION

Petitioner seeks review of a final decision of the court of appeals entered on January 8, 2009. Rehearing and rehearing en banc were denied on February 2, 2009. Petitioner filed this Petition on June 18, 2009. This Court issued an order on July 7, 2009 extending Respondents' time to file a response to the petition to, and including, September 3, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-1611 (Pet. App. 78a-95a; Resp't App. 1-9), the Alien Tort Statute, 28 U.S.C. § 1350 (Pet. App. 96a), and the Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note (Pet. App. 97a-99a).

STATEMENT OF THE CASE

According to the Petition, this case raises two questions concerning the application of the FSIA: (1) whether FSIA immunity applies at all to natural persons who, like Petitioner, serve as officials of a foreign state; and (2) even if the FSIA does extend to individuals, whether it applies to this suit, where Petitioner is no longer an official of a foreign state. However, the issues presented are not that clean or

simple, for this case involves claims brought under the ATS and the TVPA against Petitioner/Defendant Mohamed Ali Samantar, who is a former official of the Somali regime of Major General Mohamed Siad Barre. Respondents/Plaintiffs seek to hold Petitioner liable for acts of torture, rape, and extrajudicial killing committed under Petitioner's oversight. This suit is brought solely against Samantar as an individual and not against Somalia, which notably has lacked a functioning central government since 1991 when Petitioner fled the country after the collapse of the Barre regime.

Given the above factual and legal circumstances, the resolution of the issues in this case will necessarily entail this Court's review not only of the FSIA but also the ATS and the TVPA as well as how those three statutes interact in circumstances where a former official of a now failed state has been sued for torture, rape, and extrajudicial killings.

A. Petitioner's Actions Giving Rise To Respondents' Claims

Respondents in this case were citizens of Somalia who suffered under the military dictatorship of General Barre, either as direct victims or as family members of others tortured and killed by government agents. Respondents allege that Petitioner, who served as a General in the Somali Army and as Minister of Defense during much of the time period relevant to this litigation and who controlled

members of the military, knew or should have known of the abuse and persecution Respondents and their family members suffered under the regime.

Respondent Bashe Abdi Yousuf, for example, was a young businessman who helped form a public service organization dedicated to improving education and health care in the Somali city of Hargeisa. In November 1981, he was abducted by government agents and taken to a detention center where he was tortured repeatedly over a period of several months. Among other things, Yousuf was subjected to electro-shock treatment and a torture called "the MIG,"[1] in which Yousuf's hands and feet were tightly bound together behind his back so that his body was pulled into a U-shape with his limbs high in the air. The torturers then placed a heavy rock onto his back, producing excruciating pain and causing the ropes to cut deeply into Yousuf's arms and legs. Yousuf was interrogated about the members and activities of his organization and told that the torture would end if he falsely confessed to anti-government crimes. He spent the next six years of his life in solitary confinement in near total darkness. Fleeing Somalia after his release, Yousuf arrived in the United States in 1991, and later became a naturalized United States citizen.

Respondent Jane Doe was taken from her home in July 1985 and detained for three months in a small

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[1] This method of torture is so named because the prisoner's body resembles the Somali Air Force's MIG aircraft.

cell, her left leg chained to the floor and her arms tied behind her back with wire. In addition to being regularly interrogated and tortured, Jane Doe was raped at least fifteen times by a man in a camouflage uniform after he cut open her vagina with fingernail clippers.[2] Jane Doe was later sentenced to life in prison. She spent three and a half years in solitary confinement before she was released and fled Somalia.

Throughout this time, Petitioner was a high-ranking government official in Somalia, having taken part in the 1969 coup led by Barre that seized power from the nation's democratically elected government. From about January 1980 to December 1986, Petitioner served as First Vice President and Minister of Defense of the Democratic Republic of Somalia. Around January 1987, he was appointed Prime Minister of Somalia, a position he held until approximately September 1990. Petitioner served as a General in the Somali Armed Forces throughout this time.

The Barre regime engaged in a decades-long oppression of disfavored social groups and political opponents – oppression that included widespread and systematic torture, arbitrary detentions, and extra-judicial killings against innocent civilians. These

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[2] As a child, Jane Doe was subjected to infibulation, a procedure commonly performed on Somali girls. Her vagina was sewn closed except for a tiny hole.

horrific acts, Respondents allege, were the natural and foreseeable consequences of a common, shared design and joint criminal enterprise on the part of the leaders of the Barre regime and the Somali Armed Forces. Samantar was a part of that criminal enterprise and shared its common goal to rid Somalia of certain groups, particularly non-ruling clans perceived as disloyal. As a General, Minister of Defense, and Prime Minister, Samantar shared command and control over the Somali military. Respondents further allege that at all relevant times Samantar failed or refused to take necessary measures to investigate and prevent these abuses, or to punish personnel under his command for committing such abuses.

In 1991, the Barre regime collapsed. Since then, there have been approximately 14 attempts to form a Somali government, but each has failed. Somalia currently has no functioning government, and the United States maintains no official presence there.

When the Barre regime fell, Samantar fled Somalia. He went first to Italy, and then came to the United States. He has enjoyed a comfortable retirement in Fairfax, Virginia since June 1997. Respondents subsequently found Samantar and in 2004 brought suit against him in federal court.

B. District Court Proceedings

On November 10, 2004, Respondents filed this suit in the United States District Court for the Eastern District of Virginia, alleging jurisdiction

pursuant to the ATS and the TVPA. Pet. App. 43a. The district court stayed proceedings while Petitioner urged the State Department to issue a Statement of Interest regarding his immunity. After two full years of silence and inaction by the Department despite Petitioner's efforts to secure federal government intervention (as often occurs in cases involving claims of foreign sovereign immunity), the court reinstated the case to the active docket. Pet. App. 44a. After Respondents filed a second amended complaint, Petitioner moved to dismiss for lack of subject matter jurisdiction, arguing that the FSIA granted him immunity. Pet. App. 44a-45a; *see* 28 U.S.C. §§ 1602-1611.

The district court granted Petitioner's motion to dismiss, holding that the FSIA applied to individuals as well as foreign states themselves. Pet. App. 47a. Respondents appealed.

C. Fourth Circuit Proceedings

The Fourth Circuit reversed the district court's judgment. Pet. App. 2a. First, the panel unanimously held that the FSIA does not grant immunity to individuals. Pet. App. 20a. The Fourth Circuit looked to the statute's plain text, which makes no mention of immunity as to individual officers or agents and only grants immunity to a "foreign state," defined as "includ[ing] a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)." 28 U.S.C.

§ 1603(a). An "agency or instrumentality" is defined in section 1603(b) as "any entity":

> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603(b). The absence of any explicit reference to individuals is telling, the Fourth Circuit determined, particularly when Congress conferred immunity on a "foreign state" by using terms and vocabulary that clearly refer to corporate and legal entities, not natural persons. For example, the term "separate legal person" is a term of art "laden with corporate connotations." Pet. App. 17a (citing *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 625 (1983) ("The idea of a [s]eparate legal personality has been described as an almost indispensible aspect of the public corporation.") (internal quotation marks omitted)). Likewise, section 1603(b)(3) refers to "citizen[s]" under the federal diversity statute, 28 U.S.C. § 1332, "which govern[s] the citizenship of corporations and legal representatives of estates," and is "inapplicable to individuals" as "it is nonsensical to speak of an

individual, rather than a corporate entity, being 'created' under the laws of a country." Pet. App. 19a.

The Fourth Circuit concluded that the text shows Congressional intent that the FSIA should not apply to individuals. "If Congress meant to include individuals acting in [their] official capacity in the scope of the FSIA, it would have done so in clear and unmistakable terms." *Id.* at 18a (quoting *Enahoro v. Abubakar*, 408 F.3d 877, 881-82 (7th Cir. 2005)). The legislative history further supports this conclusion: "'[S]eparate legal person' was 'intended to include a corporation, association, foundation, or any other entity which, under the law of the foreign state where it was created, can sue or be sued in its own name, contract in its own name or hold property in its own name'." *Id.* at 20a (quoting H.R. Rep. No. 94-1487, at 10 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6614) (internal quotations omitted). Thus, the court below held that "the district court erred by concluding that Samantar is shielded from suit by the FSIA." *Id.*

A majority of the court also held that even if individuals do fall under the FSIA, the statute does not shield former officials from the jurisdiction of United States courts. *Id.* at 25a.[3] Section 1603(b) of the FSIA is written in the present tense, defining an

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[3] Judge Duncan joined in the panel's first holding and concurred in the judgment. Judge Duncan declined to join in the panel's second holding. Pet. App. 26a-27a.

"agency or instrumentality of a foreign state" as an entity "which *is* a separate legal person," "which *is* an organ of a foreign state [or] *is* [majority] owned by a foreign state," and "which *is* neither a citizen of a State of the United States as defined in section 1332(c) and (e)." 28 U.S.C. § 1603(b) (emphasis added). In *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), this Court interpreted section 1603(b) to mean that a corporation maintained FSIA immunity only so long as the state continued to own a majority of its shares. *Id.* at 478. If, at the time of filing suit, the corporation was no longer majority state-owned, it did not qualify for immunity under the FSIA. *Id.* The panel majority held that if an individual could be an "agency or instrumentality" of a "foreign state" under the FSIA, then *Dole Food*'s reasoning would apply equally to that individual, as the plain text of the statute treated corporations no differently than other agencies or instrumentalities. Pet. App. 22a-23a. This fits with the purpose of sovereign immunity, which is not to prevent chilling effects on foreign governments, but to provide foreign states "some protection from the inconvenience of suit as a gesture of comity." *Id.* at 24a (quoting *Republic of Austria v. Altmann*, 541 U.S. 677, 709 (2004)) (internal quotation marks omitted).

The Fourth Circuit remanded the case to the district court for further proceedings. *Id.* at 26a.

REASONS FOR DENYING THE PETITION

This Petition presents a poor case for this Court's review because of the unique facts and particular legal claims involved. Petitioner is, for instance, a former official of a government that no longer exists in a country that has had no functioning government or central authority for the past 18 years. A ruling here may thus be limited to a very unusual, and easily distinguishable, set of facts. Furthermore, the Petition oversimplifies the complex legal issues in this case. Jurisdiction here is premised on the ATS and the TVPA, *not* on the FSIA, as were *In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71 (2d Cir. 2008), and other like cases. To resolve the issues presented would thus require the Court to delve into the interactions among these three statutes – not to mention those cases like *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004), interpreting those statutes.

The Petition cannot overcome this case's uniqueness and complexity as it presents no compelling arguments to justify granting review of the Fourth Circuit's well-reasoned opinion. Petitioner claims, for instance, that the circuits have disagreed on the question of whether the FSIA applies to former officials, but he bases that split in authority entirely on *dicta* in a single case. Petitioner also predicts that the Fourth Circuit's other holding – that the FSIA does not apply to individuals at all – will cause a tidal wave of litigation. The Seventh Circuit reached the same conclusion more than four years ago, however,

and Petitioner fails to proffer any evidence that a deluge of filings has occurred as a result. Petitioner further argues that this case presents an urgent matter implicating international comity and our federal Government's ability to pursue its foreign policy objectives, but omits mention of how – despite Petitioner's active two-year lobbying campaign – the Government has chosen not to intervene in this case (unlike other litigation where individual officials were sued).

Because this case presents unique factual and legal circumstances, and because it was in any case rightly decided, this Court should deny the petition.

I. THE UNIQUE CIRCUMSTANCES OF THIS CASE MAKE IT A POOR VEHICLE TO REVIEW THE QUESTIONS PRESENTED

The atypical facts of this case make it a poor vehicle for determining the rules of sovereign immunity that will apply to nations worldwide – nations in very different situations than Somalia. Indeed, the unique circumstances presented here will unduly complicate and limit the Court's holding.

Somalia has lacked a functioning government since 1991, when the Barre regime collapsed and Samantar fled the country. There is still no functioning central authority with territorial control over Somalia, despite approximately 14 attempts to establish one in the past 18 years. The Court will have to answer what has become of this former country's

sovereignty under the FSIA and how that status impacts the analysis here, particularly where Petitioner is a former official of a now failed state. And, unlike other cases in which it has intervened on an official's behalf, the State Department remained studiously silent in the face of two years' worth of concerted efforts from Samantar and two putative Somali governments for a statement of immunity for Petitioner. Indeed, these facts demonstrate that this suit does not strongly implicate the usual concerns that animate the doctrines of governmental and sovereign immunities – international comity and the United States' ability to conduct foreign policy. Thus, rather than clarifying the legal issues this Petition purports to ask, the facts of this case only raise more questions – questions that though not presented for review, still color and shape the legal analysis. The questions of when a state as a legal matter no longer exists, and what happens to that state's sovereign immunity, may be intellectually interesting, but they hardly make an ideal backdrop for determining the scope of the sovereign immunity granted to the rest of the world's nations.

Moreover, this case does not involve an attempt to punish a foreign government or to influence American foreign policy, two issues which often arise in the sovereign immunity context. Unlike *Terrorist Attacks*, 538 F.3d 71, for example, this case is not about reaching into any government's coffers. This is a suit against Petitioner individually; Respondents do not seek recovery from Somalia's treasury. And,

unlike *Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009), this litigation is not about changing or influencing U.S. foreign policy. Somalia is not a defendant, and this is not an attempt at an end-run around the FSIA.

Perhaps most importantly, this case is complicated by the fact that it is brought under the ATS and the TVPA, whereas other decisions regarding the FSIA's applicability to officials were premised on the FSIA alone, *see, e.g.*, *Terrorist Attacks*, 538 F.3d 71. Petitioner ignores these other two statutes in his Petition, thus presenting the Court with an oversimplified view of the case. To hold the FSIA applicable to Petitioner, this Court would also have to address the interactions among the three statutes – not to mention its recent holding in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), which endorsed Respondents' understanding of the ATS and TVPA – and decide whether Congress intended the TVPA and ATS to permit federal claims against individual officials of a foreign state for acts of torture and extrajudicial killings. These issues further demonstrate what a poor vehicle this case offers for this Court's review.

II. THERE IS NO CIRCUIT SPLIT ON WHETHER FSIA IMMUNITY APPLIES TO FORMER OFFICIALS

The Fourth Circuit is the first and, to date, the *only* court to have decided the question whether, assuming FSIA immunity applies to government officials, those officials retain immunity even after

they have left office for acts taken while in office. Samantar claims that there is a circuit split on this question, but he cites only a single case to support this conclusion, the D.C. Circuit's recent decision in *Belhas v. Ya'alon*, 515 F.3d 1279 (D.C. Cir. 2008), which expressly declined to decide the issue, *see id.* at 1284-85, 90. Samantar thus tries to manufacture a circuit split armed only with *dicta*. The argument is meritless, and review by this Court is unwarranted.

In *Belhas*, the plaintiffs argued that the FSIA does not apply to former officials. All three judges on the panel refused to decide the question, however, as plaintiffs had failed to raise it in the district court. *Id.* at 1284-85 ("We need not ultimately decide the merits of this argument, as it is not properly before us. . . . [T]his is not a proper case for us to decide this question of statutory interpretation."); *id.* at 1290 (Williams, J., concurring) ("Plaintiffs' failure to raise the argument before the district court provides ample ground for rejection, and I join the court on that point."). The panel's discussion of this issue was therefore nonbinding *dicta*. *See Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 352 n.12 (2005) ("Dictum settles nothing, even in the court that utters it."); *cf. Stickel v. United States*, 76 S. Ct. 1067, 1068 (1956) (Harlan, J.) (denying application for stay and continuance of bail and noting lower-court *dictum* "present[s] nothing reviewable by this Court"). Other than the present case, Petitioner cites no court of appeals to have addressed this issue, let alone decided it.

Review here would accordingly be premature. The Fourth Circuit's decision came down early this year, and the other circuits have not yet had time to confront the issue and determine whether to follow the Fourth Circuit's reasoning. Further consideration in the lower courts could help clarify and focus the issue for subsequent review by this Court, if a circuit conflict ever actually arises. Additionally, some of the issues tied up with this question in this case – the traditional scope of sovereign immunity and the potential application of the TVPA and ATS – add additional layers of complication and uncertainty that make this case unsuitable for this Court's review.

Finally, the Petition's inclusion of the question whether former officials fall within the FSIA's ambit hardly makes this a "better vehicle" for interpreting the law, as Samantar claims. In fact, it does precisely the opposite. The Fourth Circuit expressly decided this case on both grounds. If the first question alone is reversed, the second, narrower holding remains binding circuit precedent. *See United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 485-86 (1924) ("[W]here there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, the ruling on neither is obiter [*dicta*], but each is the judgment of the court, and of equal validity with the other." (internal quotation marks omitted)). Reversal of only one of the holdings would have no effect and would impermissibly render the opinion an advisory one. *See* U.S. CONST. art. III, § 1; *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) ("We are not

permitted to render an advisory opinion, and if the same judgment would be rendered by the [lower] court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.").

III. THE RECENT CIRCUIT SPLIT ON WHETHER THE FSIA APPLIES TO INDIVIDUALS DOES NOT REQUIRE IMMEDIATE RESOLUTION BY THIS COURT

While the Fourth Circuit expressly recognized a disagreement among the circuits on the question of whether the FSIA applies to individual officials, Pet. App. 14a-15a, the mere recognition of a split in authority does not mandate immediate review by this Court. Indeed, there are clear reasons that the Petition should be denied and the issue left to further discussion and consideration by the lower courts, after which review by this Court may be warranted.

First, the split in authority is of recent vintage. Only two circuit courts have examined the question since the Seventh Circuit created the circuit split less than five years ago – the Second Circuit in *In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71 (2d Cir. 2008), a decision which this Court recently declined to review, *see Fed. Ins. Co. v. Kingdom of Saudi Arabia*, 557 U.S. ___, 129 S. Ct. 2859 (2009) (No. 08-640) (June 29, 2009), and the Fourth Circuit's decision in this case. That so few courts that have had the opportunity to consider the differing approaches

alone is sufficient to deny the Petition here; the issue should be allowed to percolate through the lower courts.

Moreover, the Fourth Circuit's decision presents the most comprehensive and thorough statutory analysis of any of the courts that have examined whether the FSIA applies to individuals. The panel carefully considered the Act's plain language, structure, purpose, and legislative history: Its careful consideration stands in stark contrast to the reasoning of other courts, which have often simply cited to the Ninth Circuit's decision in *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095 (9th Cir. 1990), without further discussion. *See, e.g.*, *Belhas*, 515 F.3d at 1283; *Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 815-16 (6th Cir. 2002); *Byrd v. Corporacion Forestal y Industrial de Olancho S.A.*, 182 F.3d 380, 388-89 (5th Cir. 1999). *Chuidian* itself devoted only two short paragraphs to statutory analysis. *See* 912 F.2d at 1100-01. Thus, the split rests on weak analytical underpinnings that courts will have to revisit in light of the Fourth Circuit's in-depth and thoughtful statutory interpretation. At the very least, this Court should defer review until other courts have considered the issue more fully.

IV. THE FOURTH CIRCUIT'S DECISION FOLLOWS THE CLEAR INTENT OF CONGRESSIONAL ENACTMENTS AND DOES NOT CONFLICT WITH THIS COURT'S PRECEDENT

In refusing to apply the FSIA to individuals, the Fourth Circuit not only followed the clear intent of Congress as expressed in the plain meaning of the statute but also recognized, as *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004), counsels, that the proper inquiry on remand is to focus on the two statutes that conferred jurisdiction and provided Petitioner's causes of action, namely the ATS and TVPA. Because the Fourth Circuit's decision comports with this Court's precedent, the Petition should be denied.

A. The FSIA Does Not By Its Plain Language Apply To Individual Officials

Using well-established tools of statutory construction articulated by this Court, the Fourth Circuit correctly analyzed the statutory text and purpose in concluding that the FSIA does not apply to individuals – a view that the United States has explicitly endorsed on inquiry from this Court. *See* U.S. Amicus Br. at 6, *Fed. Ins. Co. v. Kingdom of Saudi Arabia*, 557 U.S. ___, 129 S. Ct. 2859 (2009) (No. 08-640) ("The text, structure, and history of the FSIA demonstrate that it was not intended to address the immunity of foreign officials."). Petitioner's

arguments do nothing to undermine the circuit's cogent analysis.

First, the Court should infer nothing from Congress's silence on the subject of individuals: this approach – "by saying Congress did not exclude individuals . . . therefore they are included" – "seem[s] upside down as a matter of logic." *Enahoro*, 408 F.3d at 882. But Petitioner attempts just these logical acrobatics. He concedes that the law does not explicitly confer immunity on individuals, but argues nevertheless that the definition of a "foreign state" in 28 U.S.C. § 1603 impliedly includes individuals because officials or employees of a foreign state are readily seen as an "agency or instrumentality" of a government. Pet. at 10. This runs counter to the corporate connotations inherent in the statute's language and definitions, as identified by the Fourth Circuit. Pet. App. 17a-18a. Further, the statute clearly mandates specific criteria that any entity claiming immunity as an "agency or instrumentality" of a foreign state must meet. 28 U.S.C. § 1603; *see also* H.R. Rep. No. 94-1487, at 10 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6614 (each "criterion" in the definition of "agency or instrumentality" must be met in order to fall under the FSIA). A natural person undoubtedly could not qualify under the Act's very terms: an individual is not an "entity" which is a "separate legal person," which, in turn, is an organ of a foreign state or majority-owned by such state. 28 U.S.C. § 1603(b). Indeed, a person is not commonly thought of as an "agency or instrumentality" at all,

and had Congress intended to include individuals in the definition of "foreign state," it would have chosen an appropriate word or term – like "agent" or "official" – to make that intention plain. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means . . . what it says there."). As the Seventh Circuit observed:

> [I]f it was a natural person Congress intended to refer to, it is hard to see why the phrase "separate legal person" would be used, having as it does the ring of the familiar legal concept that corporations are persons, which are subject to suit. . . . If Congress meant to include individuals acting in the official capacity in the scope of the FSIA, it would have done so in clear and unmistakable terms.

Enahoro, 408 F.3d at 881-82. Section 1603 simply does not contemplate the application of the FSIA to individual officials.

Petitioner's proposed construction of the law is also at odds with other provisions of the FSIA. Section 1605, for instance, carves out limited exceptions to sovereign immunity, including torts involving "injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment." 28 U.S.C. § 1605(a)(5). If, as Samantar posits, a "foreign

state" already includes individuals, the mention of officials and employees is superfluous and without purpose. *See, e.g., Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used."). Another FSIA provision, section 1608, establishes the exclusive methods of service of process under the FSIA. It permits various types of service on an agency and instrumentality of a foreign state, but these methods manifestly do not contemplate service on an individual. As the Fourth Circuit noted,

> service must be perfected "by delivery of a copy of the summons and complaint either to an *officer*, a *managing or general agent*, or to any other agent *authorized by appointment or by law* to receive service of process in the United States." . . . This language is strikingly similar to the general procedural rule for service on a corporation or other business entity. *See* FED. R. CIV. P. 4(h)(1)(B). The requirements for serving an individual, by contrast, can be found back in Rule 4(e) ("Serving an Individual Within a Judicial District of the United States"), or even Rule 4(f) ("Serving an Individual in a Foreign Country"). The fact that section 1608 uses language virtually identical to that found in Rule 4(h) for service upon corporate entities and fails to prescribe or refer to service provisions for individual defendants strongly supports our interpretation that "an agency

> or instrumentality of a foreign state" cannot be an individual.

Pet. App. 19a-20a (emphasis in original).

Undaunted by this pellucid textual evidence, Samantar points to the so-called "Terrorism Exception," 28 U.S.C. § 1605A, which creates a cause of action against foreign states and their officials, agents, and employees, as proof that the FSIA includes individuals in its grant of immunity. Pet. at 12-13. But Samantar rests his argument here on flawed reasoning. He cites, for instance, *In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71 (2d Cir. 2008), to support the claim that section 1605A makes specific reference to the "legal status" of individual officials acting on behalf of a state, which "evince[s] congressional recognition that claims against individual officials . . . must be brought within the confines of the FSIA." *Id.* at 84. Essentially, the term "foreign state," according to Petitioner, includes individuals acting on that state's behalf for immunity purposes, but because those same individuals cannot be designated "state sponsors of terrorism," when Congress enacted section 1605A, it wanted to make clear that the new cause of action would hold liable both foreign states, who were state sponsors of terrorism, and the individuals acting on that state's behalf for certain terrorist acts.

While this argument has some superficial appeal, this reading of the FSIA would render the statute internally inconsistent and lead to absurd results.

For instance, Petitioner's reading would create inconsistency as the term "foreign state" would mean two different things under section 1605A. "Foreign state" would first include individuals when stripping a "foreign state" of immunity, 28 U.S.C. § 1605A(a)(1) ("A foreign state shall not be immune. . . ."), but would then exclude individuals in the creation of a cause of action where the two concepts are specifically distinguished, 28 U.S.C. § 1605A(c) ("A foreign state that is or was a state sponsor of terrorism . . . and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable. . . ."). Samantar cannot explain why Congress would purposefully draft a law in this manner.

Petitioner's reading of the FSIA would result in other statutory inconsistencies that make the Fourth Circuit's logic and interpretation even more compelling. For instance, were individuals included in FSIA's definition of "agency," a foreign officer would be subject to suit *personally* for his or her state's commercial transactions, 28 U.S.C. § 1605(a)(2), and would be subject to punitive damages from which the foreign state is expressly exempted, *id.* § 1606. His personal property could additionally be used to satisfy terrorism-related judgments against the state itself. *Id.* § 1610(g)(1). As the federal government has noted, "It is difficult to believe that Congress intended . . . that the personal property of every official or employee of a state sponsor of terrorism would be available for execution to satisfy a terrorism-related

judgment against the state." U.S. Amicus Br. at 7, *Federal Ins. Co. v. Kingdom of Saudi Arabia*, 557 U.S. ___ (2009) (No. 08-640). Under Petitioner's reading of the statute, litigants would "have an obvious incentive to name as many individual foreign officials as possible as defendants, in order to maximize potential recovery and circumvent the FSIA's limitations on attachment and damages against the state." U.S. Amicus Br. at 17, *Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009) (No. 07-2579). Samantar thus would place individuals in a decidedly unenviable position that is not warranted by the statute's text and purpose.

Petitioner is not saved by his contention that because a suit against an official is the "equivalent" of suit against that official's foreign state, a state must share its immunity with its officer. Pet. at 10-11. This argument proves too much. Courts, for instance, have long viewed a suit against an "agency or instrumentality" as the potential "equivalent" of a suit against the state. *See, e.g.*, *Ford Motor Co. v. Dep't of Treasury of Indiana*, 323 U.S. 459, 463 (1945); *Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 400-01 (1979) ("[A]gencies exercising state power have been permitted to invoke the [Eleventh] Amendment in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself."). Yet, despite this case law, Congress deemed it necessary to detail specific requirements to resolve whether an "agency" falls within the FSIA. If

suits against a foreign government's agent or agency can both be tantamount to a suit against that government, it is unclear why Congress would choose to construct a careful and specific regime for determining an agency's immunity but not broach discussion about the FSIA's application to individuals. Petitioner offers no cogent explanation for why the statute would employ different language to effectuate the same result as to state agencies and agents.

Finally, Petitioner erroneously points to Congressional use of the verb "include" to define "foreign state" under the FSIA, *see* 28 U.S.C. § 1603, as demonstrating that the definition is merely illustrative and not exhaustive. But the use of "include" in section 1603 pertains to the exception it specifically identifies. The term "foreign state" under section 1603 "includes" such state's agencies and instrumentalities in all of the FSIA's provisions *except* 28 U.S.C. § 1608, which deals with service of process. In section 1608, the law provides for different means of effectuating service as to "foreign states" and an "agency or instrumentality" thereof, and accordingly the statute must make clear that "foreign state" does not "include" that state's "agency or instrumentality." *See* H.R. Rep. No. 94-1487, at 9 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6613 ("In section 1608, the term 'foreign state' refers only to the sovereign state itself."). Without this exception, the service provisions regarding agencies and instrumentalities would be mere surplusage. The purpose of "include" in section 1603, therefore, is directly attributable to Congress's careful delineation

between states and their agencies for service of process and not an attempt to indicate that the definition of "foreign state" in section 1603 is incomplete.

In short, the immunity granted to "foreign states" under the FSIA does not apply to individuals.

B. The Decision Below Is Consistent With This Court's Holding In *Sosa v. Alvarez-Machain*, The ATS, And The TVPA

Having correctly determined that the FSIA does not apply to a former individual military official, the Fourth Circuit's decision to reverse the dismissal and remand the case properly comports with the holding in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004), and is consonant with congressional intent behind the ATS and TVPA.

In *Sosa*, this Court found that Congress provided "a clear mandate . . . that establish[es] an unambiguous and modern basis for federal claims of torture and extrajudicial killing" through the enactment of the ATS and, more recently, the TVPA. *Id.* at 728 (internal quotation marks omitted). Carefully reviewing the history of both statutes, *id.* at 712-38, this Court confirmed that enactment of the TVPA affirmed and broadened the ATS's jurisdictional reach to include individuals engaging in torture and extrajudicial killing. Indeed, Congress made it clear that former government officials are not entitled to FSIA immunity from suit for their involvement in torture and extrajudicial killing under the TVPA. *See* S. Rep.

No. 102-249, at 8-10 (1991), 1991 WL 258662, at *7-8; *see also* H.R. Rep. No. 102-367(I), at 4-5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 87-88 ("Only 'individuals,' not foreign states, can be sued under the bill."). The TVPA, after all, uses the term "individual," making crystal clear that foreign states and their agencies or instrumentalities cannot be sued under this bill under any circumstances, but only individual persons. Thus, the TVPA, enacted over a decade after the FSIA, is not meant to be thwarted by the FSIA:

> [T]he committee does not intend these immunities [sovereign, diplomatic, and head of state] to provide former officials with a defense to a lawsuit brought under this legislation. . . . [T]he FSIA should normally provide no defense to an action taken under the TVPA against a former official.

S. Rep. No. 102-249, at 8 (1991), 1991 WL 258662, at *6; *see Nat'l Cable & Telecomms. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 335 (2002) ("Specific statutory language should control more general language when there is a conflict between the two.").

At the same time, the *Sosa* Court explicitly endorsed the Second Circuit's pathbreaking ATS case, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), in which the ATS was found to provide jurisdiction to hear claims against a former Paraguayan army officer who had committed numerous atrocities while in office. *See Sosa*, 542 U.S. at 730-31. Indeed, any doubt as to the jurisdiction conferred by the ATS in

certain cases involving torture and extrajudicial killing was, as the *Sosa* Court observed, removed by congressional enactment of the TVPA, in which the Legislature affirmed and codified the holding in *Filartiga*. *Sosa*, 542 U.S. at 731. The case at bar presents very similar claims of inhumane treatment leveled against a former official for actions taken during his tenure in office that exceeded the scope of his legal authority. *See Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1289 (11th Cir. 2002) ("Congress intended to adopt the doctrine of command responsibility from international law as part of the [TVPA]." (citing S. Rep. No. 102-249, at 9 (1991), 1991 WL 258662, at *7; *In re Yamashita*, 327 U.S. 1 (1946))). In permitting the suit to go forward, the Fourth Circuit was following the clear dictates of this Court and Congress through the TVPA and ATS.

C. The Fourth Circuit's Reasoning That Immunity Must Be Evaluated Based On The Facts At The Time Of Suit Comports With Supreme Court Precedent

The Fourth Circuit correctly held that even if individuals do fall under the FSIA, the statute does not shield former officials from the jurisdiction of United States courts. Pet. App. 25a. This holding follows from the text and intent of the FSIA, as well as this Court's decision in *Dole Food Co. v. Patrickson*, in which a unanimous Court held that a corporate defendant is covered under FSIA only if it

qualifies as an "agency or instrumentality" of a foreign state at the time the suit was filed. 538 U.S. 468, 478 (2003).

Both the Fourth Circuit and *Dole Food* started with the text of the statute. Section 1603(b) defines "agency or instrumentality" entirely in the present tense. An agency or instrumentality of a foreign state is an entity "which *is* a separate legal person," "which *is* an organ of a foreign state [or] *is* [majority] owned by a foreign state," and "which *is* neither a citizen of a State of the United States as defined in section 1332(c) and (e)." 28 U.S.C. § 1603(b)(1)-(3) (emphasis added). The Court in *Dole Food* read this language to mean what it said: "[T]he plain text of this provision, because it is expressed in the present tense, requires that instrumentality status be determined at the time suit is filed." 538 U.S. at 478.

This use of the present tense fits with the jurisdictional nature of sovereign immunity. *See id.* It is a "longstanding principle that 'the jurisdiction of the Court depends upon the state of things at the time of the action brought'"; the FSIA's text similarly provides that FSIA immunity status is to be determined by the facts at the time of suit. *Id.* (quoting *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993)) (internal quotation marks omitted). This principle also applies equally to this case, as jurisdiction for both corporations and individuals (assuming an individual comes under the FSIA as an "agency or instrumentality" at all) depends on the facts at the

time suit is filed, not at the time of the acts giving rise to the action.

Samantar tries to distinguish *Dole Food* by pointing out that it construed only subpart (2), which deals with an entity "which is an organ of a foreign state . . . or a majority of whose shares or other ownership interest is owned by a foreign state." 28 U.S.C. § 1603(b)(2); *see* Pet. at 14-16. But as the Fourth Circuit noted, "this argument knocks the legs out from under his own contention that the FSIA applies to individuals." Pet. App. 22a. To be an "agency or instrumentality of a foreign state," Samantar must satisfy all three subparts of section 1603(b), including subpart (2), interpreted by *Dole Food*. Either subpart (2) applies to Samantar, in which case *Dole Food* applies, or subpart (2) does not apply, in which case Samantar cannot be an agency or instrumentality. Further, *Dole Food*'s rationale applies equally to the definition's other clauses, each of which is subject to the same textual analysis. Pet. App. 23a. Nothing in the statutory text suggests a distinction between corporations and any other "agency or instrumentality" on either point.

Recognizing this, Samantar does not press the statutory text and ironically ends up leaning on the differences between corporations and individuals instead. Pet. at 13-15. Even assuming that Petitioner is correct that individuals fall within the ambit of the FSIA, Petitioner fails to show why being an individual would require a different result here. A state can act only through others, whether corporations or

individuals. Both corporations and individuals can act independently from the state, and both can act on behalf of the state. The "transformation" from public to private actor can occur just as readily for individuals as for corporate entities. The mere fact of a corporation being 50.1% or 49.9% owned by the state makes no substantial difference on the "direct and immediate impact on the foreign state's treasury." Pet. at 15. By stating that "no similar transformation occurs when an official leaves office," *id.*, Samantar simply assumes the point he is trying to prove. A foreign state has a significant and direct interest in preventing damage awards against the corporations in which it owns an interest, just as that state has an interest in preventing judgments against its officials while they are in office when sued in their official capacity. But this does not explain why, under this reading, Congress's identical language means different things in different parts of the same statute.

This Court's decision in *Republic of Austria v. Altmann*, 541 U.S. 677, 709 (2004), buttresses the conclusion that FSIA immunity is to be decided based on the facts at the time of suit. In *Republic of Austria*, the Court held that the statutory exception to foreign sovereign immunity for "property taken in violation of international law," 28 U.S.C. § 1605(a)(3), applies to claims based on conduct that occurred before the enactment of this statute, despite the defendant's contention that at the time of the conduct, he would have been immune from suit. *See* 541 U.S. at 696.

The Court clarified that foreign sovereign immunity is determined at the time the suit is filed:

> [T]he principal purpose of foreign sovereign immunity has never been to permit foreign states and their instrumentalities to shape their conduct in reliance on the promise of future immunity from suit in United States courts. Rather, such immunity reflects current political realities and relationships, and aims to give foreign states and their instrumentalities some *present* "protection from the inconvenience of suit as a gesture of comity."

Id. at 696 (quoting *Dole Food*, 538 U.S. at 479) (emphasis in original). Justice Breyer's concurrence puts the point more starkly: "[T]he legal concept of sovereign immunity, as traditionally applied, is about a defendant's *status* at the time of suit, not about a defendant's *conduct* before the suit." *Id.* at 708 (Breyer, J., concurring) (emphasis in original).

Accordingly, the Fourth Circuit correctly applied Supreme Court precedent.

V. EVEN IF THE FSIA APPLIES TO FORMER OFFICIALS, IT DOES NOT REACH THE CONDUCT ALLEGED HERE

Even were this Court to decide both questions in Petitioner's favor, the result would not change. Determining that the FSIA applies to former officials does not settle the question of jurisdiction here. Under

settled principles of law, the district court will still have jurisdiction over this suit because Samantar's acts were outside of his lawful authority.

It is well established that FSIA immunity does not cover acts that exceed the scope of one's lawful, official authority. Even *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095 (9th Cir. 1990), recognizes this principle. *See id.* at 1106 ("'[W]here the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions.'" (quoting *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949))); *see also Jungquist v. Al Nahyan*, 115 F.3d 1020, 1028 (D.C. Cir. 1997) (The inquiry as to whether an act falls within an official's lawful authority has two parts, "focus[ing] on the nature of the individual's alleged actions [and] whether the [official] was authorized in his official capacity."); *Byrd v. Corporacion Forestal y Industrial de Olancho S.A.*, 182 F.3d 380, 388-89 (5th Cir. 1999) ("The FSIA's protections cease, however, when the individual officer acts beyond his official capacity."); *Phaneuf v. Republic of Indonesia*, 106 F.3d 302, 308 (9th Cir. 1997) ("If the foreign state has not empowered its agent to act, the agent's unauthorized act cannot be attributed to the foreign state; there is no 'activity of the foreign state'" for FSIA purposes."); *Hilao v. Estate of Marcos*, 103 F.3d 767, 777 (9th Cir. 1996) ("[A] higher official need not have personally performed or ordered the abuses in order to be held liable" under the TVPA. "[R]esponsibility for torture, summary execution, or

disappearances extends beyond the person or persons who actually committed those acts – anyone with higher authority who authorized, tolerated or knowingly ignored those acts is liable for them." (quoting S. Rep. No. 102-249 at 9 (1991), 1991 WL 258662, at *7) (quotation marks omitted) (alteration in original)); *Doe v. Liu Qi*, 349 F. Supp. 2d 1258, 1287 (N.D. Cal. 2004) (no immunity where China "appears to have covertly authorized but publicly disclaimed the alleged human rights violations").

An official's lawful authority is bounded both by the laws of his country and by customary international law. *Cf. Sosa v. Alvarez-Machain*, 542 U.S. 692, 738 (2004). Petitioner's actions clearly violated both limitations. The Somali Constitution during Barre's regime itself purported to outlaw rape, torture, and extrajudicial killings by the government. *See* CONSTITUTION OF THE SOMALI DEMOCRATIC REPUBLIC art. 27.1 (prohibiting the use of torture); *id.* at art. 25.2 (prohibiting extrajudicial killings); *id.* at art. 26.2-26.3 (prohibiting arbitrary detention); *id.* at art. 19 (requiring Somalia to follow customary international law). Such acts are never within the scope of lawful, official authority for any office Petitioner held. *See Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1198 (S.D.N.Y. 1996) (FSIA inapplicable because acts of torture fall "outside the scope" of defendant's official authority); *Xuncax v. Gramajo*, 886 F. Supp. 162, 175-76 (D. Mass. 1995) (FSIA inapplicable because acts of torture, summary execution, arbitrary detention, disappearance and cruel, inhuman or degrading

treatment "exceed anything that might be considered to have been lawfully within the scope of Gramajo's official authority"). The courts have also recognized these acts as violations of customary international law. *See Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) (cited with approval in *Sosa*, 542 U.S. at 732); *Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995) ("[O]fficial torture is prohibited by universally accepted norms of international law, and the Torture Victim Act confirms this holding and extends it to cover summary execution." (emphasis and internal citation omitted)). Petitioner is thus not entitled to protection under the FSIA regardless of how the questions presented here are decided, and review accordingly would not change the outcome of the case.

VI. THE FOURTH CIRCUIT'S DECISION WILL NOT "OPEN THE FLOODGATES" OF LITIGATION

Petitioner also urges this Court to grant review to prevent "artful pleading" against officers of a foreign state that will "swallow the 'rule' prohibiting actions against foreign states." Pet. at 17. The Fourth Circuit's decision will not only open the floodgates to increased litigation, Petitioner argues, but also will harm international comity and the ability of the federal government to execute its foreign policy goals. But the evidence for this Pandora's Box is sorely lacking. Petitioner cites only "a Westlaw search" he performed – without providing any details that would allow independent corroboration. *Id.* at 17 n.1. Even

assuming that there has been an increase in suits against foreign officials, Samantar fails to show that this increase is statistically significant and not simply concomitant with the general increase in litigation over the last three decades. *See* U.S. Courts, Judicial Facts and Figures 2007, tbls. 4.1 and 4.4, *available at* http://www.uscourts.gov/judicialfactsfigures/2007/all2007judicialfactsfigures.pdf (charting number of civil suits filed from 1990 to 2007); Thomas H. Cohen, Office of Justice Programs, U.S. Dep't of Justice, Bureau of Justice Statistics Bulletin No. NCJ 208713, Federal Tort Trials and Verdicts, 2002-03 (Aug. 2005), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/fttv03.pdf (charting tort cases terminated in federal district courts from 1970 to 2003).

Further, Petitioner fails to account for the Seventh Circuit's 2005 decision finding that the FSIA does not apply to individuals and allowing suits against officials, like the former President of Nigeria, to go forward. *See generally Enahoro v. Abubakar*, 408 F.3d 877, 881-82 (7th Cir. 2005). The Fourth Circuit cannot "open the floodgates" – they are already open – and Petitioner does not even try to show that *Enahoro* resulted in anything like the flood of litigation predicted here. On these grounds alone, Petitioner's "floodgate" arguments are unfounded and do not militate in favor of this Court's review of the case.

In reality, plaintiffs' ability to bring civil actions against human rights abusers still will be constrained by the Article III requirement that a court have

personal jurisdiction over any defendant. The federal long-arm provision that Petitioner claims will enable this flood is in fact a narrow one; it applies only in federal cases where a defendant is a non-resident of the United States, and has minimum contacts with the United States as a whole, but also has insufficient contacts with any state to support jurisdiction. *See* FED. R. CIV. P. 4(k)(2). This "narrowly tailored" provision was enacted in 1993 in response to the Supreme Court's suggestion in *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 111 (1987). *See* FED. R. CIV. P. 4(k), advisory committee's notes to 1993 amendments ("This paragraph corrects a gap in the enforcement of federal law [and] responds to the suggestion of the Supreme Court made in *Omni Capital*."). Far from applying in "virtually all suits," as Petitioner suggests, this provision will only apply in limited circumstances. In most cases, the defendant will either lack sufficient contacts with the United States as a whole, or – as in this case – will have sufficient contacts with at least one state to support personal jurisdiction in that state. Finally, and most importantly, Rule 4(k)(2) represents the policy decision of this Court, which proposed this very rule, and of Congress, who approved it. Samantar's quibble over the policy embodied in this rulemaking is with these bodies, not with the Fourth Circuit's decision implementing Congress's clear intent.

CONCLUSION

For the reasons cited above, the Petition should be denied.

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APPENDIX

Foreign Sovereign Immunities Act of 1976
Excerpts
United States Code
Title 28

§ 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim –

(a) for which a foreign state would not be entitled to immunity under section 1605 or 1605A of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

* * *

§ 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

§ 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if –

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property –

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: Provided, That such property is not used for purposes of maintaining a

diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605A, regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if –

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to

effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a) (2), (3), or (5), 1605(b), or 1605A of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if –

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

(f)

(1)(A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5 (b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A.

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized by the foreign state, the property has been held in title by a natural person or, if held in trust, has been held for the benefit of a natural person or persons.

(2)(A) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A, the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

(B) In providing such assistance, the Secretaries –

(i) may provide such information to the court under seal; and

(ii) should make every effort to provide the information in a manner sufficient to allow the court to direct the United States Marshall's office to promptly and effectively execute against that property.

(3) **Waiver.** – The President may waive any provision of paragraph (1) in the interest of national security.

(g) **Property in certain actions.** –

(1) **In general.** – Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject

to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of –

(A) the level of economic control over the property by the government of the foreign state;

(B) whether the profits of the property go to that government;

(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

(D) whether that government is the sole beneficiary in interest of the property; or

(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

(2) United States sovereign immunity inapplicable. – Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act.

(3) Third-party joint property holders. – Nothing in this subsection shall be construed to supersede the authority of a court to prevent

appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.

§ 1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if –

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(c) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.

The Constitution of the Somali Democratic Republic

Excerpts

Article 19. International Legal Norms

The Somali Democratic Republic shall recognize the Universal declaration of human rights and generally accepted rules of international law.

* * *

Article 25. Right to Life and Personal Security

1. Every individual shall have the right to life and personal security

2. The law shall determine the conditions in which the death sentence may be passed.

Article 26. Personal Liberty

1. Every person shall have the right to personal integrity.

2. No person shall be liable to any form of detention or other restrictions of personal liberty, except when apprehended in *flagrante delicto* or pursuant to an act of the competent judicial authority in the cases and in the manner prescribed by the law.

3. Any person who shall be detained on grounds of security shall without delay be brought before the Judicial authority which has competence over the offence for which he is detained within the time limit prescribed by law.

4. Every person who shall be deprived of his personal liberty shall forthwith be informed of the offence of which he is accused.

5. No person shall be searched except in the conditions mentioned in paragraph 2 of this article, or under laws relating to judicial, sanitary, fiscal and security matters, and in the manner prescribed by the law, giving due respect to the honor and integrity of the person.

Article 27. Security of the Person Under Detention

1. A detained person shall not be subjected to physical or mental torture.

2. Corporal punishment shall be prohibited.

REPLY BRIEF

Supreme Court, U.S
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No. 08-1555

IN THE

Supreme Court of the United States

MOHAMED ALI SAMANTAR,

Petitioner,

v.

BASHE ABDI YOUSUF ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY FOR PETITIONER

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REPLY FOR PETITIONER

I. THE COURTS OF APPEALS ARE DIVIDED ON IMPORTANT QUESTIONS UNDER THE FSIA THAT MERIT THIS COURT'S IMMEDIATE REVIEW

The Brief in Opposition concedes, as it must, that there is a "split in authority" that "the Fourth Circuit expressly recognized" about "whether the FSIA applies to individual officials." Opp. 16. The Second, Fifth, Sixth, Ninth, and D.C. Circuits hold that FSIA immunity extends to foreign officials, whereas the Fourth and Seventh Circuits hold that it does not. *Compare In re Terrorist Attacks on Sept. 11, 2001* ("*Fed. Ins. Co.*"), 538 F.3d 71, 85 (2d Cir. 2008), *cert. denied sub nom. Fed. Ins. Co. v. Kingdom of Saudi Arabia*, 129 S. Ct. 2859 (2009); *Byrd v. Corporacion Forestal y Industrial de Olancho*, 182 F.3d 380, 388 (5th Cir. 1999); *Keller v. Cent. Bank of Nig.*, 277 F.3d 811, 815 (6th Cir. 2002); *Chuidian v. Phil. Nat'l Bank*, 912 F.2d 1095, 1103 (9th Cir. 1990); and *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1027 (D.C. Cir. 1997), *with* Pet. App. 17a-20a; *Enahoro v. Abubakar*, 408 F.3d 877, 881-82 (7th Cir. 2005).

This 5-2 conflict among the circuits is important and warrants this Court's immediate intervention. The decision below contravenes the text, history, and purposes of the FSIA. *See* Pet. 10-13. If allowed to stand as the law of the Fourth Circuit, it will undermine the comity between the United States and other sovereigns that the FSIA was meant to ensure, *see, e.g., Dole Food Co. v. Patrickson*, 538 U.S. 468, 479 (2003), and will "amount to a blanket abrogation of foreign sovereign immunity by allowing litigants,"

simply by suing a foreign official instead of the state itself, "to accomplish indirectly what the [FSIA] bar[s] them from doing directly." *Chuidian*, 912 F.2d at 1102.

Faced with this deep circuit split, Respondents make the lackluster argument that review should be denied because the split over whether the FSIA applies to foreign officials "is of recent vintage" and because the Fourth Circuit's "careful consideration" of the issue "stands in stark contrast" to the decisions of other courts, including *Chuidian*. Opp. 16-17. In fact, however, the split is mature and recurring, the issue having been definitively resolved by seven circuits over the last nineteen years, beginning with the Ninth Circuit's seminal opinion addressing the issue at length in *Chuidian*. *See* 912 F.2d at 1099-1103. Respondents' preference for what they call the Fourth Circuit's "careful consideration," instead of *Chuidian*'s, Opp. 17, provides no basis for denying review. To the contrary, the well-developed views on both sides of the split make this case the ideal vehicle to resolve the conflict.

The second Question Presented—whether FSIA immunity applies to *former* government officials—provides an additional reason for granting review. Respondents cannot deny that, at a minimum, this issue has engendered strongly divergent views (whether technically denominated as conflicting holdings or not) between the Fourth and D.C. Circuits. *See* Pet. App. 21a; *Belhas v. Ya'alon*, 515 F.3d 1279, 1285 (D.C. Cir. 2008) (explaining that the argument that a former official "loses [the] protection [afforded by the FSIA] on the day he resigns or reaches the expiration of his term" "makes no

practical sense [and] would be a dramatic departure from the common law of foreign sovereign immunity, as codified in the FSIA"); *id.* at 1291 (Williams, J., concurring) (arguing that *Dole Food* does not support the argument that a former official loses FSIA immunity upon leaving office). *See also* Brief for the United States as Amicus Curiae at 9-10, *Fed. Ins. Co. v. Kingdom of Saudi Arabia*, 129 S. Ct. 2859 (2009) (08-640), 2009 WL 1539068 (Solicitor General's Br.) (describing the disagreement between this case and the D.C. Circuit's "holding" on this issue and explaining that "the D.C. Circuit concluded that the temporal rule of *Dole Food* does not apply to foreign officials").

Respondents also concede, as they must, that the Fourth Circuit's resolution of the "former official[]" question is a "holding" that constitutes "binding circuit precedent." Opp. 15. It is a holding that is inextricably intertwined with the threshold question, on which the circuits are divided, of whether FSIA immunity extends to individual officials at all. Thus, this is not a situation where a lower court's alternative holding on an unrelated issue might prevent this Court from reaching a certworthy question in the first place. *Cf. Abdur'Rahman v. Bell*, 537 U.S. 88 (2002) (Stevens, J., dissenting) (dismissing certiorari in habeas case out of concerns over possible procedural default). And it is a holding of enormous importance in its own right because it would eviscerate the FSIA and "have a significant impact on . . . the United States' relations with [foreign] state[s]" if the FSIA allowed a foreign official to be sued in U.S. courts for official acts the moment he leaves office. *Belhas*, 515 F.3d at 1291 (Williams, J., concurring). For that reason, the

Solicitor General has described the "prospect that, under *Dole Food*, foreign officials could lose immunity upon leaving office" as "problematic" and "anomal[ous]." Solicitor General's Br. at 9. Indeed, "the Executive recognizes that foreign officials retain immunity for their official acts after leaving their positions and views any contrary rule as rife with potential to disturb foreign relations" and cause "very significant reciprocal implications in foreign courts for former officials of the United States." Brief for the United States as Amicus Curiae at 17-18, *Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009) (No. 07-2579-cv).

Thus, this case presents one question on which seven courts of appeals are deeply divided and a second inextricably intertwined and profoundly important question on which the Fourth Circuit's holding differs from the views of the D.C. Circuit and the Executive Branch.[1] This Court should grant the

[1] Respondents question the importance of the Fourth Circuit's decision by quibbling over the number of additional lawsuits in which it will result. Opp. 35-37. But Respondents cannot deny that suits against foreign officials have increased significantly in recent years, and that the decision below will escalate this trend. What matters is not the precise number, but that the Fourth Circuit's decision will enable federal jurisdiction over suits against foreign officials that Congress intended to foreclose. Just as *Ex parte Young*, 209 U.S. 123 (1908), dramatically altered the viability of suits against state officials, the Fourth Circuit's decision will open the door to more suits against foreign officials than would be permitted under the overwhelming weight of authority followed by five other circuits. Moreover, in attempting to minimize the nationwide impact of the decision below, Respondents ignore cases in which Federal Rule of Civil Procedure 4(k)(2) has served as a nationwide long-arm statute eliminating the need for plaintiffs to comply with any one state's long-arm requirements. *See, e.g., Mwani v. bin Laden*, 417 F.3d 1, 10-11 (D.C. Cir. 2005); *Touchcom, Inc. v.*

Petition to decide these related issues concerning the immunity that the FSIA affords to foreign officials.

II. RESPONDENTS MANUFACTURE ILLUSORY VEHICLE PROBLEMS THAT DO NOT WEIGH AGAINST THIS COURT'S REVIEW

Faced with these two certworthy questions, Respondents conjure up a series of alleged issues that they concede are "not presented for review" in this Court, but that they nonetheless contend "still color and shape the legal analysis" and weigh against granting the Petition. Opp. 12. These supposed vehicle problems are illusory and irrelevant.

First, Respondents argue that Somalia purportedly "lack[s] a functioning government" and is a "failed state." Opp. 11-12. Respondents offer no judicial authority or statutory argument about how internal political unrest in a foreign country can affect that state's FSIA immunity[2] or why such unrest makes

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Bereskin & Parr, 574 F.3d 1403, 1407-08, 1418 (Fed. Cir. 2009); *Progressive Games, Inc. v. Amusements Extra, Inc.*, 83 F. Supp. 2d 1185, 1193-96 (D. Colo. 1999). They likewise ignore that some statutes under which plaintiffs typically sue foreign officials expressly provide for nationwide service of process. *See* Pet. 18.

[2] Contrary to Respondents' argument, permitting federal jurisdiction over the claims against Petitioner in these circumstances would raise precisely the sorts of foreign-relations concerns that the FSIA was meant to obviate. As the Somali Transitional Federal Government ("TFG") wrote to the State Department, this lawsuit poses a "'danger to the reconciliation process in Somalia [by] hold[ing] a flame to past events and reviv[ing] old hostilities.'" Pet. App. 55a (quoting Feb. 17, 2007 letter from the TFG's Deputy Prime Minister and

this case "unique." Opp. 11-12. Moreover, the district court noted that Respondents waived the argument "that Somalia does not qualify as a 'state' for purposes of the FSIA," Pet. App. 47a n.12, and the Fourth Circuit expressly declined to reach this issue, Pet. App. 11a n.3. Therefore, as the case reaches this Court, there is no dispute over whether Somalia is a "foreign state" for purposes of the FSIA, 28 U.S.C. § 1603(a). In fact, Somalia bears all the indicia of a foreign state: the State Department recognizes Somalia as such, and Somalia maintains diplomatic relations with the United States and membership in the United Nations. *See* U.S. Dep't of State, Bureau of Intelligence & Research, *Fact Sheet: Independent States in the World* (July 29, 2009), http://www.state.gov/s/inr/rls/4250.htm; *see also* Permanent Mission of the Somali Republic to the United Nations, *Mission Personnel*, http://www.un.int/wcm/content/site/somalia/pid/3243 (listing Somalia's representatives to the United Nations); Pet. App. 54a (noting that "the Somali Transitional Federal Government . . . is supported and recognized by the United States").

Second, Respondents suggest that this case is unique because their purpose in bringing suit "does not involve an attempt to punish a foreign

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Acting Prime Minister, Salim Alio Ibro, to the State Department); *see also Belhas*, 515 F.3d at 1287 (explaining that where a former regime is no longer in power, "'our Government could have normal relations with the government of the day—unless disrupted by [a lawsuit against a former official in] our courts, that is'") (quoted source omitted).

government or to influence American foreign policy." Opp. 12-13 (citing *Federal Insurance Co.* and *Matar*). But the FSIA immunizes "foreign state[s]" from claims in U.S. courts regardless of the plaintiff's subjective motivation. *See* 28 U.S.C. § 1604. Moreover, Respondents offer no support for the purposes that they ascribe to *Federal Insurance Co.* and *Matar*, both of which involve claims, just like this case, for monetary damages from foreign officials. *See Fed. Ins. Co.*, 538 F.3d 71, *aff'g* 349 F. Supp. 2d 765, 794-95 (S.D.N.Y. 2005); *Matar*, 563 F.3d at 11-12. Indeed, cases in which plaintiffs, like Respondents, seek monetary damages from foreign officials are hardly unusual. *See, e.g.*, *Belhas*, 515 F.3d at 1281-82; *Enahoro*, 408 F.3d at 878-79; *Lizarbe v. Rondon*, No. PJM 07-1809, 2009 WL 2208159, at *1-2 (D. Md. Feb. 26, 2009); *Li Weixum v. Bo Xilai*, 568 F. Supp. 2d 35, 35-36 (D.D.C. 2008).

Third, Respondents make the mystifying assertion that whereas this case "is brought under the ATS and the TVPA," thus purportedly requiring the Court to consider the interrelationship of these statutes with the FSIA, "other decisions regarding the FSIA's applicability to officials were premised on the FSIA alone." Opp. 13 (citing *Fed. Ins. Co.*, 538 F.3d 71). But cases against foreign officials that implicate the FSIA, including *Federal Insurance Co.*, are frequently brought under the TVPA and/or the ATS. *See Fed. Ins. Co.*, 538 F.3d 71, *aff'g* 349 F. Supp. 2d at 780; *see also, e.g.*, *Matar*, 563 F.3d at 10-11; *Belhas*, 515 F.3d at 1282; *Enahoro*, 408 F.3d at 878-79, 883; *Pugh v. Socialist People's Libyan Arab Jamahiriya*, No. Civ.A.02-02026 HHK, 2006 WL 2384915, at *1 (D.D.C. May 11, 2006); *Doe I v. State of Israel*, 400 F. Supp. 2d 86, 96-97 (D.D.C. 2005). In

all events, FSIA immunity does not vary depending on the type of suit being immunized. To the extent Respondents suggest, Opp. 27-28, that the FSIA does not apply at all to claims under the ATS or the TVPA, their argument is belied by the language of the FSIA, which confers immunity without regard for the source of the underlying cause of action; by decisions of this Court and others, *see Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 437-38 (1989); *Belhas*, 515 F.3d at 1289; and by legislative history, *see* S. Rep. No. 102-249, at 7 (1991) ("[T]he TVPA is not meant to override the [FSIA]."); H.R. Rep. No. 102-367(I), at 5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 88 (same).

Fourth, Respondents argue that, even if the FSIA applies to former officials, the district court would still have jurisdiction over this case because Petitioner's alleged acts were supposedly "outside of" his "official authority." Opp. 33. But the Fourth Circuit expressly declined to reach this argument, Pet. App. 11a n.3, and the district court rejected it, Pet. App. 53a-55a. As the district court explained, "[t]here is . . . no doubt that Samantar is being sued in his capacity as a former Minister of Defense and Prime Minister," and the complaint expressly sues Samantar in these official roles. Pet. App. 53a-54a. "Moreover, the Somali Transitional Federal Government, which is supported and recognized by the United States as the governing body in Somalia," has reaffirmed that the alleged actions "'would have been taken by Mr. Samantar in his official capacit[y].'" Pet. App. 54a-55a. Accordingly, this case is unlike those in which the FSIA may not extend to foreign officials for actions unrelated to their official duties, *see, e.g.*, *Jungquist*, 115 F.3d at

1028 (personal promise by foreign official to compensate plaintiff for injuries sustained in boating accident), or for official actions disclaimed by the foreign state, *see, e.g.*, *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1470-72 (9th Cir. 1994). Respondents' argument is thus both meritless and not properly before this Court.[3]

In sum, Respondents' arguments about the "color and shape [of] the legal analysis," Opp. 12, do not detract from the suitability of this case as an excellent vehicle to resolve the significant Questions Presented about the scope of individual immunity under the FSIA.

III. THE FOURTH CIRCUIT'S DECISION IS ERRONEOUS

Respondents devote the bulk of their Opposition to a series of inapposite arguments defending the Fourth Circuit's decision.

First, 28 U.S.C. § 1605(a)(5), on which Respondents rely, Opp. 20, actually undermines their argument. This provision creates an *exception* to sovereign immunity for certain torts "caused by . . . any official or employee of [a] foreign state." Of course, there would be no need for such an express exception to sovereign immunity if the FSIA did not

[3] To the extent Respondents argue even more broadly for a *per se* rule that official actions that allegedly violate international and/or domestic law are never immunized by the FSIA, they are wrong again. As the D.C. Circuit explained in rejecting this argument, reading such an exception into the FSIA would contravene Congress's intent and "'place an enormous strain not only upon our courts but, more to the immediate point, upon our country's diplomatic relations with any number of foreign nations.'" *Belhas*, 515 F.3d at 1287 (quoted source omitted).

apply to foreign officials in the first place. *See, e.g.*, *Alden v. Maine*, 527 U.S. 706, 724 (1999) ("The handful of state statutory and constitutional provisions authorizing suits or petitions of right against States only confirms the prevalence of the traditional understanding that a State could not be sued in the absence of an express waiver, for if the understanding were otherwise, the provisions would have been unnecessary.").

Second, Respondents incorrectly assert that 28 U.S.C. § 1608, which they quote selectively, does not permit service on an individual. Opp. 21-22, 25-26. In fact, this provision authorizes service "in accordance with an applicable international convention on service of judicial documents," 28 U.S.C. § 1608(a)(2), (b)(2), a standard that plainly applies to individuals. *See also id.* § 1608(a)(3), (a)(4), (b)(3) (describing additional methods of service that are equally applicable to individuals and entities).

Third, Respondents find it anomalous that Petitioner's interpretation of the FSIA would purportedly subject foreign officials to personal liability for a state's commercial transactions, *id.* § 1605(a)(2); to punitive damages, *id.* § 1606; and to attachment of personal property to satisfy a terrorism-related judgment, *id.* § 1610(g)(1). Opp. 23-24. With respect to the former two provisions, there is no liability because nothing in these FSIA provisions expressly *authorizes* a cause of action against foreign officials. *See Republic of Austria v. Altmann*, 541 U.S. 677, 695 (2004). And, if such a cause of action did exist, foreign officials would be liable to an even *greater* extent under Respondents'

view that the FSIA does not apply to individual officials *at all*. With respect to § 1610(g)(1), the Antiterrorism Amendments to the FSIA authorize a cause of action against individual foreign officials for terrorism-related acts, 28 U.S.C. § 1605A(c), so it is hardly surprising or anomalous that the personal property of such officials would be available to satisfy a judgment.

Finally, Respondents' reliance on *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), Opp. 26-28, is misplaced because *Sosa* addressed the scope of the ATS *absent* any claim of foreign sovereign immunity. Likewise, this Court's decision in *Altmann*, which held that the FSIA applies to conduct that occurred prior to its enactment, 541 U.S. at 699-700, does not support Respondents' position. To the contrary, this Court's broad construction of the FSIA as a "comprehensive jurisdictional scheme" that "appl[ies] to *all* . . . claims of sovereign immunity" "regardless of when the underlying conduct occurred," *id.* at 697, 699 (emphasis added), suggests that immunity under the FSIA does not lapse when a foreign official leaves office.

CONCLUSION

The petition for certiorari should be granted.

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JOINT APPENDIX

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MOHAMED ALI SAMANTAR,

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

JOINT APPENDIX

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA (ALEXANDRIA)

No. 1:04-cv-01360-LMB-JFA

BASHE ABDI YOUSUF, ET AL, PLAINTIFFS

v.

MOHAMED ALI SAMANTAR, DEFENDANT

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
11/10/2004	1	Under Seal COMPLAINT Filing Fee $ 150.00 Receipt # 100 176402; jury demand (Complaint sealed per [31–1] Order) (otho) Modified on 01/31/2005 (Entered: 11/12/2004)
* * * * *		
11/16/2004	2	SUMMONS Returned Executed as to Mohamed Ali Samatar 11/11/04 Answer due on 12/1/04 for Mohamed Ali Samatar (pmet) (Entered: 11/16/2004)
12/01/2004	3	MOTION by Mohamed Ali Samatar to Dismiss the Complaint for Lack of

DATE	DOCKET NUMBER	PROCEEDINGS
		Personal Jurisdiction, and by Mohamed Ali Samatar to Dismiss the Complaint for Failure to State a Claim Upon Which Relief Can be Granted (stas) (Entered: 12/02/2004)
12/01/2004	4	MEMORANDUM of Law by Mohamed Ali Samatar in support of [3–1] motion by Mohamed Ali Samatar to Dismiss the Complaint for Lack of Personal Jurisdiction and [3–2] motion by Mohamed Ali Samatar to Dismiss the Complaint for Failure to State a Claim Upon Which Relief Can be Granted (stas) (Entered: 12/02/2004)
	* * * * *	
12/15/2004	9	OPPOSITION by Bashe Abdi Yousuf, John Doe 1, Jane Doe 1, John Doe 2, John Doc 3, John Doe 4 to [3–1] motion by Mohamed Ali Samatar to Dismiss the Complaint for Lack of Personal Jurisdiction and for Failure to State a Claim

DATE	DOCKET NUMBER	PROCEEDINGS
		Upon Which Relief Can be Granted (pmet) (Entered: 12/15/2004)
	* * * * *	
12/20/2004	11	MOTION by Mohamed Ali Samatar to Dismiss claims of anonymous pltfs (kjon) (Entered: 12/21/2004)
	* * * * *	
12/22/2004	14	Reply by Mohamed Ali Samatar in support to [3–1] motion by Mohamed Ali Samatar to Dismiss the Complaint for Lack of Personal Jurisdiction, [3–2] motion by Mohamed Ali Samatar to Dismiss the Complaint for Failure to State a Claim Upon Which Relief Can be Granted (mcke) (Entered: 12/23/2004)
	* * * * *	
12/29/2004	16	MOTION by John Doe 4, John Doe 3, John Doe 2, Jane Doe 1, John Doe 1 for Leave to Proceed Anonymously (stas)

DATE	DOCKET NUMBER	PROCEEDINGS
		(Entered: 12/29/2004)
12/29/2004	17	MEMORANDUM of Law by John Doe 1, Jane Doe 1, John Doe 2, John Doe 3, John Doe 4 in support of [16–1] motion by John Doe 4, John Doe 3, John Doe 2, Jane Doe 1, John Doe 1 for Leave to Proceed Anonymously (together with one spiral bound volume of exhibits 1–11) (stas) (Entered: 12/29/2004)
	* * * * *	
12/30/2004	19	Reply by Mohamed Ali Samatar to [3–1] motion by Mohamed Ali Samatar to Dismiss the Complaint for Lack of Personal Jurisdiction, [3–2] motion by Mohamed Ali Samatar to Dismiss the Complaint for Failure to State a Claim Upon Which Relief Can be Granted (corrected version) (jcup) (Entered: 01/03/2005)
	* * * * *	
01/05/2005	24	RESPONSE by Mohamed Ali Samatar in opposition to

DATE	DOCKET NUMBER	PROCEEDINGS
		[16–1] motion by John Doe 4, John Doe 3, John Doe 2, Jane Doe 1, John Doe 1 for Leave to Proceed Anonymously (clar) (Entered: 01/06/2005)
01/07/2005		Motion hearing held before Judge Brinkema; Reporter: Thomson; Appearances by counsel for parties re: [16–1] motion by John Doe 4, John Doe 3, John Doe 2, Jane Doe 1, John Doe 1 for Leave to Proceed Anonymously. Motion granted. Deft's Motion to Dismiss—deferred pending report from counsel regarding position of the Department of State. Discovery and Initial pretrial stayed until further Order of the Court. Order to follow. (rtra) (Entered: 01/10/2005)
01/07/2005	25	For the reasons stated in open court, ORDER granting [16–1] motion by John Doe 4, John Doe 3, John Doe 2, Jane Doe 1, John Doe 1 for Leave to

DATE	DOCKET NUMBER	PROCEEDINGS
		Proceed Anonymously. ORDERED that plaintiffs may proceed in this action anonymously and are required to reveal their identity only to defense counsel and defendant, who may not reveal the anonymous plaintiffs' identity to anyone else unless granted permission in writing from the Court or from the prospective plaintiff; and it is further ORDERED that defendant report to the Court within thirty (30) days regarding his efforts to secure the position of the Department of State, after which time the Court will reschedule argument on defendant's Motions; and it is further ORDERED that all discovery, except for requests by both parties for information from government agencies, is STAYED until further Order of this Court; and it is further ORDERED that the initial pretrial

DATE	DOCKET NUMBER	PROCEEDINGS
		conference, currently scheduled for January 12, 2005, is postponed and will be rescheduled after defendant's report to the Court. (signed by Judge Leonie M. Brinkema) Copies Mailed: 01/07/05 [EOD Date: 1/10/05] (rtra) (Entered: 01/10/2005)
* * * * *		
01/27/2005	30	AMENDED COMPLAINT by Bashe Abdi Yousuf, John Doe 1, Jane Doe 1, John Doe 2, John Doe 3, John Doe 4, Aziz Deria; amending [1-1] complaint; jury demand (pmet) Modified on 01/27/2005 (Entered: 01/27/2005)
* * * * *		
02/03/2005	32	REPORT by Mohamed Ali Samantar to the Court Regarding Position of the Department of State in Response to [25-1] Order (LARGE PLEADING) (pmet) Modified on 02/03/2005 (Entered:

DATE	DOCKET NUMBER	PROCEEDINGS
		02/03/2005)
* * * * *		
02/07/2005	34	ORDERED that deft. report again to the Court regarding the Dept. of State's position on deft.'s immunity by 3/10/05 (signed by Judge Leonie M. Brinkema) Copies Mailed: y [EOD Date: 2/7/05] (pmet) (Entered: 02/07/2005)
02/08/2005	35	MOTION by Mohamed Ali Samantar to Dismiss for lack of personal jurisdiction, failure to state a claim upon which relief can be granted, and lack of subject matter jurisdiction (pmet) (Entered: 02/09/2005)
02/08/2005	36	MEMORANDUM by Mohamed Ali Samantar in support of [35–1] motion to Dismiss for lack of personal jurisdiction, failure to state a claim upon which relief can be granted, and lack of subject matter jurisdiction

DATE	DOCKET NUMBER	PROCEEDINGS
		(pmet) (Entered: 02/09/2005)
02/22/2005	37	OPPOSITION by Bashe Abdi Yousuf, John Doe 1, Jane Doe 1, John Doe 2, John Doe 3, John Doe 4, Aziz Deria to [35–1] motion by Mohamed Ali Samantar to Dismiss for lack personal jurisdiction, failure to state a claim upon which relief can be granted, and lack of subject matter jurisdiction (pmet) (Entered: 02/22/2005)
02/28/2005	38	REPLY by Mohamed Ali Samantar to response to [35–1] motion by Mohamed Ali Samantar to Dismiss for lack of personal jurisdiction, failure to state a claim upon which relief can be granted, and lack of subject matter jurisdiction (clar) (Entered: 03/01/2005)
* * * * *		
03/15/2005	41	MOTION by Mohamed Ali Samantar for Enlargement

DATE	DOCKET NUMBER	PROCEEDINGS
		of Time to File and Motion for continuance of the deadline for reporting the position of the Department of State (LARGE PLEADING) (pmet) Modified on 03/16/2005 (Entered: 03/16/2005)
03/16/2005	42	ORDER granting [41–1] motion by Mohamed Ali Samantar for Enlargement of Time to File and Motion for continuance of the deadline for reporting the position of the Department of State ORDERED that defense counsel file by 4/15/05 a report on the position of the State Department regarding whether the Court should grant deft. head–of–state immunity (signed by Judge Leonie M. Brinkema) Copies Mailed: y [EOD Date: 3/16/05] (pmet) (Entered: 03/16/2005)
	* * * * *	
04/14/2005	45	MOTION by Mohamed Ali Samantar for Continuance

DATE	DOCKET NUMBER	PROCEEDINGS
		of the deadline for reporting on the position of the Department of State (pmet) (Entered: 04/14/2005)
04/15/2005	46	ORDER granting [45–1] motion by Mohamed Ali Samantar for Continuance of the deadline for reporting on the position of the Department of State, ORDERED that deft. file within 30 days, 5/16/05, a report on the position of the Dept. of State (signed by Judge Leonie M. Brinkema) Copies Mailed: y [EOD Date: 4/18/05] (pmet) (Entered: 04/18/2005)
05/12/2005	47	MOTION for further continuance of the deadline for reporting on the position of the Department of State as to 42 Order, by Mohamed Ali Samantar. (pmet,) (Entered: 05/12/2005)
05/20/2005	48	ORDER granting 47 Motion for Extension of Time to File Report on the position

DATE	DOCKET NUMBER	PROCEEDINGS
		of the State Department. Report due by 6/20/2005. Signed by Judge Leonie M. Brinkema on 05/20/05. c/s (pmet,) (Entered: 05/23/2005)
06/20/2005	49	MOTION for further continuance of the deadline for Reporting on the position of the Department of State, by Mohamed Ali Samantar. (pmet,) (Entered: 06/20/2005)
06/21/2005	50	ORDER granting 49 Motion for Extension of Time to File report on the position of the State Department. Report due by 7/22/2005. Signed by Judge Leonie M. Brinkema on 06/21/05. c/s (pmet,) (Entered: 06/21/2005)
07/21/2005	51	MOTION for further Continuance of the deadline for reporting on the position of the Department of State by Mohamed Ali Samantar. (nmck,) (Entered: 07/21/2005)

DATE	DOCKET NUMBER	PROCEEDINGS
07/22/2005	52	ORDER that dft file within 30 days of this Order a report on the position of the State Department regarding whether the Court should grant dft head–of–state immunity (see order for details). Signed by Judge Leonie M. Brinkema on 7/22/05 (kjon) Copies mailed (Entered: 07/25/2005)
08/19/2005	53	MOTION for further continuance of the deadline for reporting on the position of the Department of State by Mohamed Ali Samantar (kjon) (Entered: 08/19/2005)
08/22/2005	54	ORDER that defendant file within 30 days of this order a report on the position of the State Department regarding whether the Court should grant the defendant head–of–state immunity. Signed by Judge Leonie M. Brinkema on 08/22/05. Copies mailed on 8/23/05. (kbar) (Entered:

DATE	DOCKET NUMBER	PROCEEDINGS
		08/23/2005)
08/30/2005	55	ORDER that all activity in this civil action has been stayed since 01/07/05, to allow the U.S. Dept. of State to advise the court of its position as to whether the defendant is entitled to head of state immunity and that this action be and is stayed until further order of the court. Signed by Judge Leonie M. Brinkema on 08/30/05. (kbar,) (Entered: 08/31/2005)
09/21/2005	56	STATUS REPORT on Obtaining the Position of the Department of State by Mohamed Ali Samantar. (kbar,) (Entered: 09/21/2005)
10/21/2005	57	STATUS REPORT on obtaining the position of the department of state by Mohamed Ali Samantar. (kbar) (Entered: 10/21/2005)
11/21/2005	58	Status report on obtaining the position of the

DATE	DOCKET NUMBER	PROCEEDINGS
		Department of State by Mohamed Ali Samantar. (kbar) (Entered: 11/21/2005)
12/22/2005	59	STATUS REPORT on obtaining the position of the department of state by Mohamed Ali Samantar. (kbar) (Entered: 12/23/2005)
01/20/2006	60	STATUS REPORT on Obtaining the Position of the Dept of State by Mohamed Ali Samantar. (pmil) (Entered: 01/23/2006)
02/21/2006	61	STATUS REPORT on obtaining the position of the Department of State by Mohamed Ali Samantar. (kbar) (Entered: 02/21/2006)
03/17/2006	62	STATUS REPORT on Obtaining the Position of the Department of State by Mohamed Ali Samantar. (pmil) (Entered: 03/20/2006)

DATE	DOCKET NUMBER	PROCEEDINGS
04/18/2006	63	STATUS REPORT on obtaining the position of the Department of State by Mohamed Ali Samantar. (kbar) (Entered: 04/19/2006)
05/17/2006	64	STATUS REPORT on obtaining the position of the Department of State by Mohamed Ali Samantar. (kbar) (Entered: 05/17/2006)
06/15/2006	65	STATUS REPORT on obtaining the position of the Department of State by Mohamed Ali Samantar. (kbar) (Entered: 06/15/2006)
07/17/2006	66	STATUS REPORT on obtaining the position of the department of state by Mohamed Ali Samantar. (kbar) (Entered: 07/17/2006)
08/17/2006	67	STATUS REPORT on Obtaining the Position of the Department of State, filed by Mohamed Ali Samantar. (tbul,)

DATE	DOCKET NUMBER	PROCEEDINGS
		(Entered: 08/22/2006)
09/15/2006	68	STATUS REPORT ON OBTAINING THE POSITION OF THE DEPARTMENT OF STATE by Mohamed Ali Samantar. (pmil) (Entered: 09/15/2006)
10/20/2006	69	STATUS REPORT on obtaining the position of the Department of State by Mohamed Ali Samantar. (kbar) (Entered: 10/20/2006)
11/20/2006	70	STATUS REPORT on obtaining the position of the Department of State by Mohamed Ali Samantar. (kbar,) (Entered: 11/20/2006)
12/18/2006	71	STATUS REPORT on obtaining the position of the Dept. of State by Mohamed Ali Samantar. (kbar,) (Entered: 12/18/2006)
01/19/2007	72	STATUS REPORT on obtaining the position of the Department of State by Mohamed Ali Samantar.

DATE	DOCKET NUMBER	PROCEEDINGS
		(kbar,) (Entered: 01/19/2007)
* * * * *		
02/22/2007	75	NOTICE of Voluntary Dismissal by John Doe 3, John Doe 4. (kbar) (Entered: 02/23/2007)
02/22/2007	76	MOTION for Leave to File the second amended complaint by Bashe Abdi Yousuf, John Doe 1, Jane Doe 1, John Doe 2, Aziz Deria. (kbar,) (Entered: 02/23/2007)
02/22/2007	77	Memorandum in Support re 76 MOTION for Leave to File the second amended complaint by Bashe Abdi Yousuf, John Doe 1, Jane Doe 1, John Doe 2, Aziz Deria. (kbar,) Entered: 02/23/2007)
* * * * *		
03/05/2007	80	RESPONSE in Opposition to Pltf's 76 MOTION for Leave to File Second Amended Complaint filed by Mohamed Ali Samantar.

DATE	DOCKET NUMBER	PROCEEDINGS
		(agil) (Entered: 03/05/2007)
* * * * *		
03/08/2007	81	REPLY in support of Plaintiff's Motion for Leave to File the Second Amended Complaint 76 filed by Bashe Abdi Yousuf. (lhin,) (Entered: 03/12/2007)
03/09/2007		Minute Entry for proceedings held before Judge Leonie M. Brinkema: Motion Hearing held on 3/9/2007. Appearance of counsel. 76 Plaintiff's MOTION for Leave to File 2nd amended complaint— GRANTED. Court to issue a Scheduling Order. (Court Reporter Thomson) (lhin,) (Entered: 03/09/2007)
03/09/2007	82	ORDER: For the reasons stated in open court, it is hereby ordered the 76 Plaintiffs' Motion for Leave to File the Second Amended Complaint be and is GRANTED. Signed by Judge Leonie M. Brinkema

DATE	DOCKET NUMBER	PROCEEDINGS
		on 3/9/2007. Copies sent. (lhin,) (Entered: 03/12/2007)
* * * * *		
03/29/2007	89	MOTION to Dismiss Second Amended Complaint by Mohamed Ali Samantar. (kbar,) (Entered: 03/29/2007)
03/29/2007	90	Memorandum in Support re 89 MOTION to Dismiss Second Amended Complaint filed by Mohamed Ali Samantar. (kbar,) (Entered: 03/29/2007)
* * * * *		
04/18/2007	96	Opposition to 89 MOTION to Dismiss Second Amended Complaint filed by Bashe Abdi Yousuf, John Doe 1, Jane Doe 1, John Doe 2, Aziz Deria (large pleading) (clar,) (Entered: 04/19/2007)
* * * * *		

DATE	DOCKET NUMBER	PROCEEDINGS
04/23/2007	100	REPLY to Response to Motion re 89 MOTION to Dismiss Second Amended Complaint filed by Mohamed Ali Samantar. (clar,) (Entered: 04/24/2007)
* * * * *		
04/27/2007		Minute Entry for proceedings held before Judge Leonie M. Brinkema. Motion Hearing held on 4/27/2007. Appearance of counsel. 89 MOTION to Dismiss filed by Mohamed Ali Samantar is Granted. Case dismissed. Opinion to follow. (Court Reporter Thomson.) (lhin,) (Entered: 04/27/2007)
04/27/2007	102	ORDER: For the reasons stated in open court, to be further expressed in a written opinion to be issued, the dft's 89 Motion to Dismiss Second Amended Complaint is Granted, and it is hereby ordered that the plaintiffs' complaint be and is dismissed with prejudice.

DATE	DOCKET NUMBER	PROCEEDINGS
		The time period for bringing an appeal will not begin to run until the Court has issued its written opinion. (Note: Entry of judgment is delayed until the Court has issued its written opinion). Signed by Judge Leonie M. Brinkema on 4/27/2007. (copies sent) (lhin,) (Entered: 04/27/2007)
* * * * *		
06/27/2007	105	SUPPLEMENTAL filing relating to correspondence with the State Department by Bashe Abdi Yousuf, John Doe 1, Jane Doe 1, John Doe 2, Aziz Deria. (krob) (Entered: 06/27/2007)
08/01/2007	106	MEMORANDUM AND OPINION. Signed by Judge Leonie M. Brinkema on 8/1/2007. (lhin,) (Entered: 08/02/2007)
08/01/2007	107	ORDER: For the reasons stated in open court and in the accompanying Memorandum Opinion, the

DATE	DOCKET NUMBER	PROCEEDINGS
		defendant's Motion to Dismiss Second Amended Complaint has been granted, and it is hereby ordered that the Clerk enter judgment in the defendant's favor pursuant to Fed. R. Civil P. 58. Signed by Judge Leonie M. Brinkema on 8/1/2007. (copies sent) (lhin,) (Entered: 08/02/2007)
08/01/2007	108	CLERK'S JUDGMENT. Pursuant to the order of this Court entered on 8/1/2007 and in accordance with Federal Rules of Civil Procedure 58, JUDGMENT is hereby entered in favor of the Defendant Mohamed Ali Samantar against the Plaintiff, Bashe Abdi Yousuf, et al. Signed by Judge Leonie M. Brinkema on 8/1/2007. (copies sent) (lhin,) (Entered: 08/02/2007)
08/30/2007	109	NOTICE OF APPEAL as to 108 Clerk's Judgment dated 8/1/07, 107 Order dated 8/1/07 by Bashe Abdi

DATE	DOCKET NUMBER	PROCEEDINGS
		Yousuf, John Doe 1, Jane Doe 1, John Doe 2, Aziz Deria. Filing fee $ 455, receipt number 100003298. Copy sent to USCA and to parties. (nmck,) (Entered: 09/05/2007)
* * * * *		
01/08/2009	111	PUBLISHED Opinion of USCA decided 1/8/09 re 109 Notice of Appeal, Reversed and Remanded attached copy of judgment will not take effect until issuance of the mandate. (nmck,) (Entered: 01/09/2009)
* * * * *		
02/02/2009	113	ORDER of USCA as to 109 Notice of Appeal, filed by Aziz Deria, Bashe Abdi Yousuf, John Doe 2, Jane Doe 1, John Doe 1. The court denies the petition for rehearing and rehearing en banc. (nmck,) (Entered: 02/03/2009)
02/10/2009	114	USCA JUDGMENT as to 109 Notice of Appeal, filed by Aziz Deria, Bashe Abdi

DATE	DOCKET NUMBER	PROCEEDINGS
		Yousuf, John Doe 2, Jane Doe 1, John Doe 1. In accordance with the decision of this court, the judgment of the District Court is Reversed. This case is Remanded to the District Court for further proceedings consistent with the Court's decision. This judgment shall take effect upon issuance of this court's mandate in accordance with FRAP. 41. (mandate issued) (nmck,) (Entered: 02/10/2009)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-1893

BASHE ABDI YOUSUF, ET AL,

PLAINTIFFS-APPELLANTS

v.

MOHAMED ALI SAMANTAR,

DEFENDANT-APPELLEE

ALLARD K. LOWENSTEIN INTERNATIONAL HUMAN RIGHTS CLINIC, Yale Law School; AMERICAN FRIENDS SERVICE COMMITTEE; BOSTON CENTER FOR REFUGEE HEALTH AND HUMAN RIGHTS; CONSISTENT LIFE; EARTHRIGHTS INTERNATIONAL; DOLLY FILARTIGA; FLORIDA CENTER FOR SURVIVORS OF TORTURE; GLOBAL LAWYERS AND PHYSICIANS; HUMAN RIGHTS FIRST; HUMAN RIGHTS WATCH; MARYKNOLL OFFICE OF GLOBAL CONCERNS; MUSLIM PUBLIC AFFAIRS COUNCIL; SISTER DIANNA ORTIZ; PROGRAM FOR SURVIVORS OF TORTURE AND SEVERE TRAUMA; PROGRAM FOR TORTURE VICTIMS; ROCKY MOUNTAIN SURVIVORS CENTER; SURVIVORS OF TORTURE, INTERNATIONAL; THE SHALOM CENTER; TORTURE ABOLITION AND SURVIVORS SUPPORT COALITION INTERNATIONAL; WORLD ORGANIZATION FOR HUMAN RIGHTS USA; INTERNATIONAL

RIGHTS ADVOCATES; INTERNATIONAL HUMAN RIGHTS CLINIC, Human Rights Program of Harvard Law School; UNITED STATES MEMBER OF CONGRESS AND LAW PROFESSORS,

AMICI SUPPORTING APPELLANT

DOCKET ENTRIES

DATE	DOCKET NUMBER	ENTRY
09/14/2007	1	Civil case docketed. ~ [4647365] (JHM)
* * * * *		
11/30/2007	23	MOTION filed by Appellants Aziz Deria, Jane Doe 1, Officer John Doe 1, John Doe 2, John Doe 3, John Doe 4 and Bashe Abdi Yousuf for judicial notice of FRE 201(b)(2) and facts readily available from US Dept of State and CIA concerning the region of Somalia. Was opposing counsel informed of motion pursuant to Loc. R. 27(a)? Y. Did opposing counsel consent to granting of motion? N/A. Date of service: 11/30/2007 [997766634] [07-1893]

DATE	DOCKET NUMBER	ENTRY
		(JHM)
11/30/2007	25	OPENING BRIEF (PAPER) file-stamped, on behalf of Aziz Deria, Jane Doe 1, Officer John Doe 1, John Doe 2, John Doe 3, John Doe 4 and Bashe Abdi Yousuf. Number of pages: [99]. Entered on Docket Date: 12/05/2007. [997768951] [07-1893] (JHM)
11/30/2007	26	OPENING BRIEF (PAPER) file-stamped, on behalf of Aziz Deria, Jane Doe 1, Officer John Doe 1, John Doe 2, John Doe 3, John Doe 4 and Bashe Abdi Yousuf. Number of pages: [99]. Entered on Docket Date: 12/06/2007. [997769495] [07-1893] (JHM)
11/30/2007	27	APPENDIX (PAPER) file-stamped, on behalf of Aziz Deria, Jane Doe 1, Officer John Doe 1, John Doe 2, John Doe 3, John Doe 4 and Bashe Abdi Yousuf. Total number of volumes

DATE	DOCKET NUMBER	ENTRY
		(including any sealed): 1. Total number of pages in all volumes: 234. Entered on Docket Date: 12/06/2007. [997769738] [07-1893] (JHM)
* * * * *		
12/10/2007	28	MOTION filed by US Member of Congress Law Professors to file amicus curiae brief (FRAP 29(e)) with consent of all parties on appeal within time allowed by FRAP 29(e). Potential Amicus Curiae United States Member of Congress and Law Professors in 07-1893 added to case. Was opposing counsel informed of motion pursuant to Loc. R. 27(a)? Y. Did opposing counsel consent to granting of motion? Y. Date of service: 12/10/2007 [997773110] [07-1893] (JHM)
12/10/2007	29	MOTION filed by Dolly Filartiga, Sister Dianna Ortiz, American Friends

DATE	DOCKET NUMBER	ENTRY
		Svc Committee to file amicus curiae brief (FRAP 29(e)) with consent of all parties on appeal within time allowed by FRAP 29(e). Potential Amicus Curiaes Dolly Filartiga, Sister Dianna Ortiz, American Friends Service Committee, Boston Center for Refugee Health and Human Rights, Consistent Life, EarthRights International, Florida Center for Survivors of Torture, Global Lawyers and Physicians, International Human Rights Clinic, Human Rights First, Human Rights Watch, International Rights Advocates, Allard K. Lowenstein International Human Rights Clinic, Maryknoll Office of Global Concerns, Muslim Public Affairs Council, Program for Survivors of Torture and Severe Trauma, Program for Torture Victims, Rocky Mountain Survivors Center, The

DATE	DOCKET NUMBER	ENTRY
		Shalom Center, Survivors of Torture, International, Torture Abolition and Survivors Support Coalition International and World Organization for Human Rights USA in 07-1893 added to case. Was opposing counsel informed of motion pursuant to Loc. R. 27(a)? Y. Did opposing counsel consent to granting of motion? Y. Date of service: 12/07/2007 [997773127] [07-1893] (JHM)
12/14/2007	30	ORDER filed [997774148] granting Motion to file amicus curiae brief [997773127-2] Copies to all parties. [07-1893] (JHM)
12/14/2007	31	ORDER filed [997774199] granting Motion to file amicus curiae brief [997773110-2] Copies to all parties. [07-1893] (JHM)
	* * * * *	
12/14/2007	33	AMICUS CURIAE BRIEF (PAPER) file-stamped, on

DATE	DOCKET NUMBER	ENTRY
		behalf of Allard K. Lowenstein International Human Rights Clinic, American Friends Service Committee, Boston Center for Refugee Health and Human Rights, Consistent Life, EarthRights International, Dolly Filartiga, Florida Center for Survivors of Torture, Global Lawyers and Physicians, Human Rights First, Human Rights Watch, International Rights Advocates, International Human Rights Clinic, Maryknoll Office of Global Concerns, Muslim Public Affairs Council, Sister Dianna Ortiz, Program for Survivors of Torture and Severe Trauma, Program for Torture Victims, Rocky Mountain Survivors Center, Survivors of Torture, International, The Shalom Center, Torture Abolition and Survivors Support Coalition International and World

DATE	DOCKET NUMBER	ENTRY
		Organization for Human Rights USA. Number of pages: [27]. Sealed volume: [N]. Entered on Docket Date: 12/14/2007. [997774265] [07-1893] (JHM)
12/14/2007	34	AMICUS CURIAE BRIEF (PAPER) file-stamped, on behalf of United States Member of Congress and Law Professors. Number of pages: [27]. Sealed volume: [N]. Entered on Docket Date: 12/14/2007. [997774274] [07-1893] (JHM)
12/14/2007	35	RESPONSE/ANSWER filed by Mohamed Ali Samantar to notice requesting response [997767392-2], Motion for judicial notice [997766634-2]. Nature of response: in opposition. [07-1893] (JHM)
* * * * *		
12/20/2007	37	REPLY filed by Aziz Deria, Jane Doe 1, Officer John Doe 1, John Doe 2, John

DATE	DOCKET NUMBER	ENTRY
		Doe 3, John Doe 4 and Bashe Abdi Yousuf to Response [997774763-2]. [07-1893] (JHM)
	* * * * *	
01/02/2008	44	RESPONSE BRIEF (PAPER) file-stamped, on behalf of Mohamed Ali Samantar. Number of pages: [66]. Entered on Docket Date: 01/11/2008. [997787296] [07-1893] (JHM)
	* * * * *	
01/16/2008	45	REPLY BRIEF (PAPER) file-stamped, on behalf of Aziz Deria, Jane Doe 1, Officer John Doe 1, John Doe 2, John Doe 3, John Doe 4 and Bashe Abdi Yousuf. Number of pages: [39]. Entered on Docket Date: 01/28/2008. [997795494] [07-1893] (JHM)
	* * * * *	
08/05/2008	56	COURT ORDER filed [997909222] denying

DATE	DOCKET NUMBER	ENTRY
		Motion for judicial notice [997766634-2] Copies to all parties. [07-1893] (JHM)
	* * * * *	
09/22/2008	58	SUPPLEMENTAL AUTHORITIES (FRAP 28(j)) filed by Appellants Aziz Deria, Jane Doe 1, Officer John Doe 1, John Doe 2, John Doe 3, John Doe 4 and Bashe Abdi Yousuf. [997940217]. [07-1893] (DHB)
	* * * * *	
09/23/2008	61	ORAL ARGUMENT heard before the Honorable WILLIAM B. TRAXLER, JR., ROBERT B. KING and ALLYSON K. DUNCAN. Attorneys arguing case: Tara M. Lee for Appellants Jane Doe 1, John Doe 4, John Doe 3, Aziz Deria, John Doe 2, Officer John Doe 1 and Bashe Abdi Yousuf and Mr. Frederick B. Goldberg for Appellee Mohamed Ali Samantar. Courtroom Deputy: Sarah

DATE	DOCKET NUMBER	ENTRY
		Carr. [997941505] [07-1893] (SC)
* * * * *		
01/08/2009	64	PUBLISHED AUTHORED OPINION filed. Originating case number: 1:04-cv-01360-LBM Copies to all parties and the district court/agency. [998009025] [07-1893] (JHM)
01/08/2009	65	JUDGMENT ORDER filed. Decision: reversed and remanded. Originating case number: 1:04-cv-01360-LBM. Entered on Docket Date: 01/08/2009. [998009051] Copies to all parties and the district court/agency. [07-1893] (JHM)
01/22/2009	66	PETITION for rehearing en banc (FRAP 35) filed by Mohamed Ali Samantar. [07-1893] (JS)
* * * * *		
02/02/2009	68	COURT ORDER filed [998025063] denying

DATE	DOCKET NUMBER	ENTRY
		Motion for rehearing en banc [998018501-2] Copies to all parties. [07-1893] (JHM)
02/10/2009	69	Mandate issued. Referencing: [998009051-2], Judgment Order, [998009025-3], Opinion. Originating case number: 1:04-cv-01360-LBM [07-1893] (JHM)
* * * * *		
10/05/2009	72	SUPREME COURT REMARK—petition for writ of certiorari granted. 09/30/2009 [07-1893] (DHB)

IN THE EASTERN DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

BASHE ABDI YOUSUF, et al.	*	
Plaintiffs,	*	
v.	*	Civil Action No. 1:04W1360
MOHAMED ALI SAMANTAR	*	
Defendant	*	

AFFIDAVIT OF MOHAMED ALI SAMANTAR

I, Mohamed Ali Samantar, under oath, do hereby state as follows:

1. I am over eighteen years of age and am otherwise qualified to testify to the facts and opinions set forth below. All of the facts and opinions rendered herein are based on my personal knowledge.
2. From 1971 to 1980, and again from 1982 to 1986, I served as Minister of Defense for Somalia.
3. From 1976 to 1986, I served as First Vice-president of Somalia.
4. From 1987 to September 1990, I served as Prime Minister of Somalia.

5. During my tenure as Prime Minister, the position also required that I act as the Co-Chairman of the Council of Ministers. In this position, I supervised the activities of several ministries, including, but not limited to, agriculture, transportation, health, and communication.

6. As First Vice President, I also was required to serve as Acting President in the event that the President was absent from the country while performing official visits or because of health-related incapacity. I served as Acting President on several occasions.

7. At all times during my official service to Somalia, the government of the United States recognized the government of Somalia and maintained diplomatic relations. In fact, I was received by high-ranking officials during my state visits to the United States.

8. My first official visit was in 1983, during which I met with Secretary of Defense Caspar Weinberger and with Vice-President George Bush and, during that same visit, also was received by the Undersecretary of Foreign Affairs, the Director of the Central Intelligence Agency, and the Chairman of the Joint Chiefs of Staff. Again, in 1989, as Somalia's Prime Minister, I was received by Vice-President Dan Quayle and Secretary of State James Baker.

9. From February 20, 1991 to June 25, 1997, I lived in Italy and was readily known to be living there. I was not in hiding. In Italy, my telephone number and home address were listed, and I never used a pseudonym. There

also were articles published about me that disclosed my residence in Italy, and I was in frequent correspondence with the United States and Italian consulates.

10. From June 26, 1997 to the present I have been living in Fairfax, Virginia. Again, my contact information is readily obtainable, as my telephone number and address are listed, and the Immigration and Naturalization Service documented my entry into the United States.

11. Many of the witnesses and documents relevant to the preparation of my defense are located in Somaliland or historic Somalia.

I declare under penalty of perjury that the foregoing is true and correct.

s/ Mohamed Ali Samantar
Mohamed Ali Samantar

State of VA
County of Fairfax

Sworn to and subscribed before me on the 1st day of December, 2004

s/ _____
Notary Public Signature
My Commission Expires
05/31/08

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

BASHE ABDI YOUSUF, *et al.*	)	
Plaintiffs,	)	
v.	)	Civil Action No. 1:04 CV 1360 (LMB/BRP)
MOHAMED ALI SAMANTAR	)	
Defendant.	)	

DECLARATION OF MARTIN R. GANZGLASS

I, Martin R. Ganzglass, declare as follows:

1. I am over eighteen years of age and am otherwise qualified to testify to the facts and opinions set forth below. All of the facts and opinions rendered herein are based upon my personal knowledge.

Background

2. I graduated from Harvard Law School in 1964 with an LL.B. degree. I am admitted to the Bars of the State of New York and the District of Columbia. I am currently a principal in the firm of O'Donnell, Schwartz & Anderson, P.C. and have been a principal in that firm since 1988. From 1972 until 1988 I was a principal in the firm of Delson & Gordon.

3. As described below, I have had substantial involvement with countries in the Horn of Africa, including the former country of Somalia. As a result of this involvement I am very familiar with current conditions, and the current state of the legal system, in the regions of the former country of Somalia.

4. From 1966 to 1968, I was a Peace Corps Volunteer in Somalia, serving as Legal Advisor to the Somali National Police Force. I am author of "The Penal Code of the Somali Democratic Republic: Cases, Commentary and Examples," published by Rutgers University Press in 1971. That book became the primary work on the Somali Penal Code. Rutgers University Press donated 500 copies to Somalia, and it was used at the Somali National Police Academy and was widely distributed to Somali courts.

5. I also was a contributor to Constitutions of the Countries of the World, Oceana Publications, Blaustein & Flanz, Editors, for the portion on Somalia in 1971, 1979 and 1981.

6. From 1972 through 1988, while I was with the law firm of Delson & Gordon, I represented the Embassy of the Somali Democratic Republic in the United States and the Somali Ministry of Mineral and Water Resources. During this time I also did occasional work for Somali Airlines. While I was with the firm of Delson & Gordon I made at least four visits to Somalia between 1979 and 1986.

7. In November 1992, then President George Bush authorized "Operation Restore Hope"

which sent U.S. troops to Somalia to safeguard the delivery of humanitarian assistance to Somali civilians, caught in the chaos, murder, rape and mayhem, following the collapse of the Siad Barre regime. In April 1993, while Operation Restore Hope was ongoing, I served in Somalia as Special Assistant to U.S. Ambassador Robert Gossende and Admiral Howe, the Special Representative of the U.N. Secretary General. Later I authored an article entitled "The Restoration of the Somali Justice System," which appeared in "Learning from Somalia: the Lessons of Armed Humanitarian Intervention," Westview Press, Clarke & Herbst, Editors, 1997.

8. I currently represent the Embassy of Eritrea in the United States and the Eritrean Ministry of Justice. I have assisted the Ministry in drafting a Penal Code and Code of Criminal Procedure and in preparing a long term plan for development of the Ministry and the Eritrean court system.

9. I have continued to remain in contact with Somali friends in the United States and Canada and to read about developments in Somalia. I am a subscriber to and regularly receive The Journal of the Anglo-Somali Society, which reports on events in Somaliland and Somalia. I am also a member of that Society.

The Barre Government

10. From 1969 until 1991, Somali's President was Siad Barre. Barre served as the head of the Somali state. During the time that the Barre

government was in power, the defendant Ali Samantar held high ranking positions in the Barre government.

11. A copy of the 1979 Constitution of the Somali Democratic Republic is attached as Exhibit A. To the best of my knowledge this Constitution remained in effect in Somalia until 1991.

12. As Article 79 of the Constitution makes clear, the President served as the Head of State of the Somali Democratic Republic. To the best of my knowledge, from the time Siad Barre took power in 1969 until the time his government was overthrown in 1991, I do not believe there ever was an occasion when he stepped down from his office as President.

The Post-Barre Somalia

13. In 1991 the government of Siad Barre was ousted from power. Following the overthrow of the Siad Barre regime, Somalia ceased to exist as a nation. It disintegrated into regions or districts, controlled by war lords using clan based militias to practice extortion, murder, rape, and robbery. Today, there is no central government in Somalia, no seat of government in the capital, Mogadishu, and no Constitution providing for or recognizing a federal system of government.

14. The purpose of my April 1993 assignment as Special Assistant to Ambassador Gossende and Admiral Howe was to assess the state of the Somali judiciary and police and make recommendations for the restoration and rebuilding of the Somali justice system after the Barre regime was overthrown. As part of

my mission in Somalia in 1993, I visited Police Stations and courts in Mogadishu (on both sides of the Green Line that separated areas controlled by two warring factions), the towns of Baidoa and Bardera in the south, the town of Borama in what is now known as Somaliland, and the town of Bosasso in the northeast, in what is now known as Puntland.

15. My recommendations from my assignment and 1993 visit were contained in a report to the United States Agency for International Development and in an article I wrote for a symposium conducted by the Woodrow Wilson School at Princeton University. This article was later published by Westview Press. As explained in that report, it was clear at that time that there was no functioning court system in Somalia, with the exception of a very few local courts in small areas of homogenous populations where local judges could administer a rudimentary form of justice acceptable to the local community. Generally speaking, however, Somalia was in a state of chaos, with an inadequate police force and judicial system.

16. Within the past few months, a new transitional federal government, (TFG) was elected by delegates to the latest of many lengthy, internationally sponsored conferences convened outside of Somalia, for security reasons. The TFG itself has not moved to Mogadishu due to security concerns. Instead, at the November 2004 United Nations Security Council meeting held in Nairobi Kenya, the

newly elected TFG President, Abdullahi Yusuf, himself a war lord from Puntland, requested that the United Nations provide a protective force for the TFG so it could sit in Mogadishu.

17. The government of Somaliland, located in the northwest region of former Somalia, is not part of the newly elected TFG. Despite persistent efforts, Somaliland has not been recognized as an independent country by the United States, Great Britain or any member of the European Union. While Somaliland insists that it is independent, the position of the other regional governments in the former Somalia, as well as the position of the TFG, is that Somalia should remain a unified country, consisting of all of the territory comprising Somalia from its independence in 1960 through the end of the Siad Barre regime.

18. Absent any recognition of Somaliland by the United States, there is a serious question as to whether any legal judgment rendered by the courts of Somaliland would be enforceable in the United States. If not recognized, such a judgment would be worthless against a former official of the Siad Barre regime living outside of Somaliland, unless that official submitted to the jurisdiction of the courts of Somaliland. It is my opinion that plaintiffs cannot obtain a meaningful remedy from the Somaliland courts.

19. In addition, it is not clear that Somaliland's judiciary is adequate to the task of fairly deciding cases involving human rights violations. As recently as 1999, an international conference on Human Rights in

Somaliland was held in Hargeisa, Somaliland. A report on the conference was issued by Amnesty International and International Cooperation for Development. The conference was attended by representatives of those two organizations as well as Somaliland Government Officials and local non-governmental organizations (NGOs). With respect to justice and prison conditions, the report concluded in part:

> The legal system in Somaliland is most staffed by unqualified people. . . Corruption is common and it is alleged that a legal case can be won or lost on the basis of financial leverage. There are numerous violations of human rights due to the underdeveloped legal system.

20. The court system in the other parts of Somalia, that is Puntland, Mogadishu and the south, is even more chaotic. It is my opinion that given the lack of functioning courts and trained judges in the former Somali Republic, and the continued dominance of warlords throughout the country, plaintiffs would not be able to bring a human rights case in the other parts of Somalia.

21. In my opinion, a member of the Isaaq clan who prosecutes a human rights claim against a member or members of the former Barre

government would reasonably fear reprisals by former members of the Red Berets and the National Security Service. While the Barre government no longer holds power in Somalia, many positions in the Barre government were based on clan affiliation. In Somalia today, clan affiliation has become even more significant since the overthrow of the Barre regime. Presently, in the absence of any strong central or regional government, security for any Somali depends on being in an area where his or her clan is in the majority.

22. Most members of the Red Berets and National Security Service ("NSS") were members of Siad Barre's clan, the Marehan. The Red Berets and the NSS were responsible for many of the human rights abuses suffered by the Isaaqs and other clans. In my opinion, an Isaaq who was known to be prosecuting a human rights case relating to acts taken by the Red Berets or the NSS, or searching for information to support such a case, would reasonably fear for his or her own safety, as well as for the safety of his or her family members, if that person or a family member encountered a Marehan former Red Beret or NSS member.

I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on December 13, 2004.

s/ Martin R. Ganzglass
Martin R. Ganzglass

Xukuumadda Federaalka KMG ah Ee Jamhuuriyadda Soomaaliya Wasaaradda Arrimaha Dibbadda Xafiska Wasiirka	[SEAL]	[Arabic symbols]

Transitional Federal Government of the Somali Republic
Ministry of Foreign Affairs
Office of the Minister

Ref. MFA/ V. /05 February 10, 2005

The Honorable Dr. Condoleezza Rice
Secretary of State
Department of State
Washington, D.C.

Dear Madam Secretary:

On behalf of the new national Government of Somalia, allow me to convey my appreciation to the Government of the United States for its support to the Somali people in general and in particular to our efforts to bring about a peaceful end to Somalia's 14 years of civil war and anarchy.

Your Government's efforts, including the encouragement given to the work of the Intergovernmental Authority on Development—which has spearheaded the Somali National Peace and Reconciliation Conference—have been indispensable to the process of rebuilding our country.

Furthermore, I avail myself this opportunity to request respectfully that the Department of State initiate the filing of a suggestion of immunity and/or interest with the court regarding the matter of *Bashe Abdi Yusuf v. Mohamed Ali Samatar* (civ. Act. No. 1:04W1360, US. District Court for the Eastern District of Virginia); with a view of obtaining a dismissal settlement with prejudice of the claims against Mr. Mohamed Ali Samatar.

Mr. .Samatar was immune to lawsuit as the Prime Minister and Head of Government of Somalia from 1987 to 1990 and as first Vice President and Defense Minister of Somalia from 1982 to 1986.

The prosecution of this lawsuit against Mr. Samatar would, we feel, violate the principles of immunity available under international law to former Heads of Government and senior officials of sovereign states.

The Somali reconciliation process will be made only more difficult if allegations of a wrong doing, as serious as they may be, are to be aired and debated in a forum far from the place in which those events allegedly occurred. We hope that such thoughts may help in forming the decision of the State Department to provide such a letter for interest in a lawsuit involving allegations of [sentence incomplete].

We also have concerns that the selective nature of the allegations in the lawsuit against Mr. Samatar will exacerbate the inner clan tensions that have been at the root of many of the difficulties that our country has faced and will face in the challenging process a head.

Let me thank you again for the great consideration that your Government and you have shown in your [illegible] support in our peace and reconciliation efforts. I hope that we can look forward for your continuous supporting and understanding.

Sincerely,

s/_____

Hon. Abdullahi Sheikh Ismail
Minister of Foreign Affairs [SEAL]
Transitional Federal Government
of Somalia

REPUBLIC OF [SEAL] SOMALILAND

Ministry of Foreign Affairs

Tel/Fax: 00 252 828 3871; 00 252 2 426 922 (M);
email: slforeign@hotmail.com

REF: MFA/USA/2/504/05 03 March 2005

To: James Gresser, Esq.
Office of Legal Adviser,
Diplomatic Law and Litigation
United States Department of State
2201 C Street, N.W., Room 6423
Washington, D.C. 20520

Dear Mr. Gresser:

I send you greetings from Hargeisa on behalf of the people and government of Somaliland and convey to you our appreciation for the support that your government has been providing to our people during the past fourteen years that we have been engaged in establishing a sound system of democratic governance for Somaliland.

I also wish to share with you our appreciation in knowing that legal proceedings are being filed in a United States court by several victims against Mohamed Ali Samantar, and have also been provided with a copy of a February 10, 2005 letter addressed to the United States Secretary of State by the Minister of Foreign Affairs of the Transitional Federal Government of Somalia with a view of obtaining dismissal settlement for the accused.

Since most of the events at issue in the case occurred in Somaliland and were directed against persons who are now citizens of Somaliland or their decedents, and since the case involves actions that were taken by the former government of Somalia, the people and government of Somaliland are in full support of the lawsuit.

I am not aware of any feasible means for these victims, including the plaintiffs, to obtain redress for their suffering other than through legal proceedings such as the lawsuit in the United States where Mr. Samantar now resides.

Thank you for your consideration of this letter and for the continuing support of your government for the people of Somaliland.

Yours Sincerely,
s/

Mrs. Edna Adan Ismail
Foreign Minister
Republic of Somaliland

[SEAL: Republic of Somaliland Ministry of Foreign Affairs]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

BASHE ABDI YOUSUF,
AZIZ MOHAMED DERIA, in his capacity as the personal representatives of the estate of Mohamed Deria Ali,
AZIZ MOHAMED DERIA, in his capacity as the personal representative of the estate of Mustafa Mohamed Deria,
JOHN DOE I,
AZIZ MOHAMED DERIA, in his capacity as the personal representative of the estate of James Doe I (the deceased brother of John Doe I),
AZIZ MOHAMED DERIA, in his capacity as the personal representative of the estate of James Doe II (the deceased brother of John Doe I),
JANE DOE,
and JOHN DOE II,
Plaintiffs,

Civil Action No. 1:04 CV 1360 (LMB/BRP)

SECOND AMENDED COMPLAINT FOR TORTURE; EXTRAJUDICAL KILLING; ATTEMPTED EXTRAJUDICAL KILLING; CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT; ARBITRARY DETENTION; CRIMES AGAINST HUMANITY; AND WAR CRIMES

JURY TRIAL DEMANDED

v.)
)
MOHAMED ALI)
SAMANTAR,)
)
Defendant.)

For their complaint against the Defendant Mohamed Ali Samantar, Plaintiffs allege as follows:

PRELIMINARY STATEMENT

1. This is a civil action for compensatory and punitive damages for torts in violation of international and domestic law. Plaintiffs institute this action against Defendant Mohamed Ali Samantar ("Samantar") for his responsibility for the torture of Plaintiff Bashe Abdi Yousuf; for the extrajudicial killing of Decedents Mohamed Deria Ali and Mustafa Mohamed Deria; for the torture, arbitrary detention and cruel, inhuman or degrading treatment of Plaintiff John Doe I; for the extrajudicial killing of Decedents James Doe I and James Doe II, the brothers of Plaintiff John Doe I; for the torture, rape, arbitrary detention and cruel, inhuman or degrading treatment or punishment of Plaintiff Jane Doe; and for the attempted extrajudicial killing, torture, arbitrary detention and cruel, inhuman or degrading treatment or punishment of Plaintiff John Doe II. Plaintiffs also bring claims for crimes against humanity and war crimes based upon those wrongful acts.

2. Plaintiffs allege that Defendant Samantar exercised command responsibility over, conspired with, or aided and abetted members of the Armed Forces of Somalia, or persons or groups acting in coordination with the Armed Forces or under their

control, to commit acts of extrajudicial killing; attempted extrajudicial killing; torture; crimes against humanity; war crimes; and arbitrary detention and cruel, inhuman, or degrading treatment or punishment and to cover up those abuses. Accordingly, Plaintiffs assert that Defendant Samantar is liable under domestic and international law for their injuries, pain and suffering.

JURISDICTION AND VENUE

3. Plaintiffs allege that Defendant Samantar is liable for acts of torture, extrajudicial killing and attempted extrajudicial killing as defined by customary international law and the Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350, note). Alien plaintiffs further allege that Defendant Samantar is liable for torture; extrajudicial killing; attempted extrajudicial killing; crimes against humanity; war crimes; cruel, inhuman and degrading treatment or punishment; and arbitrary detention under the Alien Tort Statute, 28 U.S.C. § 1350, in that they were in violation of customary international law. Accordingly, this Court has jurisdiction over this action based on 28 U.S.C. § 1350 (Alien Tort Statute) and 28 U.S.C. § 1331.

4. On information and belief, Defendant Samantar is a citizen of Somalia and resides in Fairfax, Virginia. Therefore venue is proper in the United States District Court for the Eastern District of Virginia pursuant to 28 U.S.C. §§ 1391(b) or (d).

PARTIES

Defendant

5. On information and belief, Defendant Mohamed Ali Samantar is a native and citizen of Somalia and currently resides in Fairfax, Virginia.

6. From about January 1980 to December 1986, Defendant Samantar served as First Vice President and Minister of Defense of the Democratic Republic of Somalia ("Somalia").

7. In or about January 1987, Defendant Samantar was appointed Prime Minister of Somalia, a position he held until approximately September 1990.

Plaintiffs

8. Bashe Abdi Yousuf is a native of Somalia, a naturalized U.S. citizen and a resident of Georgia. He is a member of the Isaaq clan. He brings this action for the torture he suffered at the hands of the Somali Armed Forces, or persons or groups acting in coordination with the Armed Forces or under their control.

9. Aziz Mohamed Deria is a native of Somalia, a naturalized U.S. citizen. He is a member of the Isaaq clan. He brings this action in his capacity as personal representative of decedents' estates for the extrajudicial killing of Mohamed Deria Ali and Mustafa Mohamed Deria, during the indiscriminate attack on the city of Hargeisa by the Somali Armed Forces, or persons or groups acting in coordination with the Armed Forces or under their control, in or about mid-June 1988. Mohamed Deria Ali and Mustafa Mohamed Deria were citizens and residents of Somalia at the time of their death. Aziz Mohamed

Deria also brings this action in his capacity as personal representative of decedents' estates for the extrajudicial killing of James Doe I and James Doe II (the brothers of plaintiff John Doe I), at the hands of the Somali Armed Forces, or persons or groups acting in coordination with the Armed Forces or under their control.

10. John Doe I is a native, citizen and resident of Somalia. He is a member of the Isaaq clan. He brings this action for the torture, arbitrary detention and cruel, inhuman, or degrading treatment or punishment he suffered at the hands of the Somali Armed Forces, or persons or groups acting in coordination with the Armed Forces or under their control. Plaintiff John Doe I seeks to proceed under a pseudonym because he fears reprisals against himself or his family as a result of his participation in this lawsuit.

11. Jane Doe is a native and citizen of Somalia. She currently resides in the United Kingdom. She is a member of the Isaaq clan. She brings this action for the torture, rape, arbitrary detention and cruel, inhuman or degrading treatment or punishment she suffered at the hands of the Somali Armed Forces, or persons or groups acting in coordination with the Armed Forces or under their control. Plaintiff Jane Doe seeks to proceed under a pseudonym because she fears reprisals against herself or her family as a result of her participation in this lawsuit.

12. John Doe II is a native, citizen and resident of Somalia. He is a member of the Isaaq clan. He brings this action for the attempted extrajudicial killing, torture, cruel, inhuman or degrading treatment or punishment, and arbitrary detention

that he suffered at the hands of the Somali Armed Forces, or persons or groups acting in coordination with or under their control, when he survived a mass execution of Isaaq officers and soldiers in the Somali Armed Forces in or about June 1988. Plaintiff John Doe II seeks to proceed under a pseudonym because he fears reprisals against himself or his family as a result of his participation in this lawsuit.

STATEMENT OF FACTS

13. Throughout the 1980s, the Somali Armed Forces committed gross human rights abuses against the civilian population of Somalia, including the widespread and systematic use of torture, rape, arbitrary detention, and mass executions. This deliberate reign of state terror occurred during the period Defendant Samantar served first as Minister of Defense, from about January 1980 to December 1986, and then as Prime Minister, from about January 1987 to about September 1990. These human rights abuses were the hallmark of the military government that came to power in 1969 and brutally ruled Somalia until the government was toppled in 1991.

14. In October 1969, a coup led by Major General Mohamed Siad Barre overthrew the first and only democratic government of the new nation of Somalia. Power was assumed by the Supreme Revolutionary Council (SRC), which consisted primarily of the Army officers who had supported and participated in the coup, including Defendant Samantar. The SRC suspended the existing Constitution, closed the National Assembly, abolished the Supreme Court and declared all political parties illegal. To further strengthen its grip on power, the SRC declared all

groups not sponsored by the government, including civic or religious groups, to be illegal.

15. To further strengthen its grip on power, the military leadership systematically favored its own clans and oppressed other clans. Even before Somalia became an independent nation, the clan system served as the fundamental building block of Somali society. Clan affiliation had long attracted great emotional allegiance and had often been the sole avenue to jobs and other scarce resources.

16. The military leadership built upon and exploited the clan system. It appointed members of favored clans to top positions in the Armed Forces, the bureaucracy, and Somali state industries, while it ruthlessly oppressed and targeted other clans, including in particular the Isaaq clan in the Northern regions. The military leadership systematically excluded disfavored clans from positions of power within the government and military and pursued draconian policies intended to weaken them politically and harm them economically. This oppression led some disfavored clans to oppose the military government.

17. Somalia's defeat in the Ogaden War with Ethiopia from 1977 to 1978 significantly weakened support for the military government. As a result, the government took increasingly fierce measures against perceived opponents, including civilians from disfavored clans. Beginning in the early 1980s and escalating over the course of the decade, the Armed Forces committed numerous atrocities against ordinary citizens including businessmen, teachers, high school students, and nomads simply tending their herds. These measures were intended to

terrorize the civilian population and to deter it from supporting the growing opposition movements.

18. The National Security Service ("NSS"), the Red Berets and the military police known as Hangash were the government's principal intelligence gathering agencies. These security forces frequently acted in coordination with or under the control of the Armed Forces, often conducted joint operations with members of the Armed Forces, and operated with the tacit approval and permission of the Armed Forces and their commander, Defendant Samantar. Security forces acting in coordination with or under the control of the Armed Forces were together responsible for the widespread and systematic use of torture, arbitrary and prolonged detention, and extrajudicial killing against the civilian population of Somalia.

19. The Isaaq clan, located primarily in the northwestern region of Somalia, was a special target of the government. The Isaaq were among the best educated and most prosperous Somalis and were therefore perceived from the outset as potential opponents. In the 1970s, the military government relied primarily upon discriminatory economic measures to weaken the Isaaq clan: it limited economic development in the north and restricted the clan's lucrative livestock trade. When the Ogaden War ended in 1978 and Ethiopian refugees flooded northern Somalia, the Somali government even implemented economic policies favoring those refugees over the Isaaq. During the 1980s, when Defendant Samantar was Minister of Defense and then Prime Minister, the government changed its

approach and unleashed the Armed Forces in a violent campaign to eliminate Isaaq clan opposition.

20. The government's extreme oppression led some members of the Isaaq clan to establish the Somali National Movement ("SNM") in 1981. The SNM articulated Isaaq grievances ranging from inadequate political representation and economic neglect of the north to the torture and detention of Isaaq citizens. In 1983 and 1984, some members of the SNM began a campaign of violent resistance and, operating from bases in Ethiopia, SNM commandos attacked military posts near the northern cities of Hargeisa, Burao, and Berbera.

21. In response, human rights abuses and war crimes by the Somali Armed Forces dramatically increased. The Somali National Army initiated a brutal counterinsurgency campaign that intentionally disregarded the distinction between civilians and SNM fighters. It killed and looted livestock, blew up water reservoirs, destroyed homes, tortured and detained alleged SNM supporters, and indiscriminately killed civilians as collective punishment for SNM activities. Such acts were intended to, and did, spread terror among the Isaaq clan in order to deter them from assisting the SNM.

22. This violent confrontation between the SNM and the Armed Forces of Somalia from 1983 to 1990 constituted an armed conflict not of an international character.

23. This pattern of crimes against humanity, including war crimes, committed against the Issaq clan continued in 1988 during the period Defendant Samantar served as Prime Minister. In June and July 1988, following SNM attacks on military targets,

the Somali Armed Forces launched an indiscriminate aerial and ground attack on cities and towns in northwest Somalia, including Hargeisa, the second largest city in the country. A 1989 U.S. General Accounting Office study, conducted at the request of Congress, found that the attack destroyed most of Hargeisa, with the most extensive damage in the residential areas, the marketplace and in public buildings in the downtown areas. A State Department report found that the Somali Armed Forces engaged in systematic assaults on unarmed civilians, killing more than 5,000 people. As a result of the fighting, approximately 400,000 Somalis fled to Ethiopia, a country itself racked by drought and internal conflict, where they remained in refugee camps for many years. More than a million people were displaced internally.

24. Throughout 1989 and 1990 the crimes of oppression and armed resistance continued, gradually leading to the reduced effective territorial control of the Barre regime and withdrawal of American and international support. By the end of 1990, the Barre regime was in the final stages of complete state collapse. In early December 1990, President Barre declared a state of emergency, and in January 1991, armed opposition factions finally drove Barre out of power, resulting in the complete collapse of the central government. When Barre and his supporters were ousted from power, they fled the country. Defendant Samantar fled first to Italy, then, in 1997, arrived to the United States.

Plaintiff Bashe Abdi Yousuf

25. At the time of the events at issue, Plaintiff Bashe Abdi Yousuf was a young businessman in

Hargeisa, the main city in the northwest region of Somalia. He operated a wholesale business selling goods imported from London and Saudi Arabia.

26. In early 1981, he joined with some friends to form a volunteer group to improve living conditions in Hargeisa, especially the local public schools and hospital. The group took the name of UFFO, which referred to the refreshing whirlwind that precedes the desert rains. UFFO's first project was to clean the sewage system of the Hargeisa General Hospital and to raise money for the purchase of badly-needed items such as bandages and medicine.

27. On or about November 19, 1981, in the late morning, Bashe Abdi Yousuf was working in the warehouse of his business. Three NSS agents entered the warehouse, forced him into a Land Cruiser and took him to the building that had housed the Somali immigration services, but was now reserved for the detention and interrogation of members of UFFO. He was searched, put in a room and left there for two days without food or water.

28. One night in early December 1981, two military policemen and an NSS officer came to Bashe Abdi Yousuf's cell. He was blindfolded, handcuffed, and forced into the back of a Land Cruiser. One of the interrogators put his boot on Bashe Abdi Yousuf's neck, forcing him to lean forward and keep his head down.

29. When the Land Cruiser stopped, Bashe Abdi Yousuf was pushed out of the car and forced face down on the ground. The interrogators tightly tied his hands and feet together behind his back so that his body was arched backward in a slightly-tilted U shape, with his arms and legs high in the air. Bashe

Abdi Yousuf's interrogators slowly placed a heavy rock on his back, causing him excruciating pain. This form of torture was called the "Mig," because it placed the prisoner's body in a shape that resembled the Somali Air Force's MIG aircraft, with its swept-back wings. They also tightened the ropes causing deep cuts to his arms and legs. They then turned him over and put the rock on his back again. They questioned him about the members and activities of UFFO and told him they would stop the torture if he confessed to anti-government crimes.

30. The interrogators also subjected him to torture by water. They held his nose closed, forced his mouth open and poured water into it, making him feel like he was suffocating. They repeated this several times until he lost consciousness.

31. Bashe Abdi Yousuf was tortured in this manner eight times in the three months after he was arrested. He also twice endured electric shocks to his armpits.

32. On or about February 19, 1982, Bashe Abdi Yousuf was served with official indictment papers. He was charged with high treason, a crime that carried a mandatory death sentence by hanging. He also met with his court-appointed attorney that day. The meeting lasted five to ten minutes. Bashe Abdi Yousuf's attorney admitted there was no redress available to him.

33. In the early morning of February 28, 1982, Bashe Abdi Yousuf, and the twenty-seven other detained members of UFFO, were taken before the National Security Court, a special military court with jurisdiction over civilians accused of national security crimes, including political offenses. The courthouse

was entirely surrounded by Army tanks and soldiers with machine guns.

34. The trial, which considered evidence against all twenty-eight men, lasted only two days. Neither Bashe Abdi Yousuf, nor any other UFFO member, was allowed to speak other than to answer preliminary questions such as "How do you plead?" He pleaded not guilty.

35. On or about March 3, 1982, Bashe Abdi Yousuf was again taken before the National Security Court. He was sentenced to twenty years in prison. He and the other twenty-seven members of UFFO were immediately taken to Hargeisa Central Prison. They were all placed together in a small cell. Bashe Abdi Yousuf remained in Hargeisa Central Prison for eight months.

36. On or about October 24, 1982, Bashe Abdi Yousuf was transferred to Labaatan Jirow prison, a notorious maximum security prison for political prisoners. He was placed in a small, windowless cell approximately 6 feet by 6 feet. The cell had an outer door that, when closed, put the cell in total darkness. The outer door was closed every day at 4 p.m. and not opened again until 7 a.m. He was fed millet gruel twice a day. He remained there in solitary confinement for approximately six and a half years.

37. Bashe Abdi Yousuf was released from prison in or about May 1989 and fled Somalia. He arrived in the United States in 1991.

Plaintiff Aziz Mohamed Deria, in his capacity as personal representative of the estates of Mohamed Deria Ali and Mustafa Mohamed Deria

38. In 1988, Aziz Mohamed Deria was living in California. Five years earlier he had fled Somalia where he had been persecuted because of his political activities on behalf of the Isaaq clan. His family, including his father, Mohamed Deria Ali, and his younger brother, Mustafa Mohamed Deria, remained in Somalia. Mohamed Deria Ali was a highly successful businessman who operated a large import-export business in Hargeisa. Like his father, Mustafa Mohamed Deria, then approximately 22 years old, was also in the import-export business.

39. In or about June of 1988, the Somali Armed Forces launched an indiscriminate aerial and ground attack on Hargeisa. The Somali Armed Forces dropped bombs on downtown Hargeisa as well as the surrounding residential areas and shelled Hargeisa with heavy artillery from the hills surrounding the city. The Somali tanks and other armored vehicles also entered the city. Groups of soldiers shot, tortured, and detained civilians throughout Hargeisa.

40. In or about June of 1988, Aziz Mohamed Deria's family members were trapped in their home by the Armed Forces' attack on the city. From the window of their home, the family could see the bombs dropping on the city and Army vehicles taking civilians away to be executed. Several buildings owned by the family were completely destroyed during the bombing.

41. On a morning in mid-June 1988, during the indiscriminate bombing of the city, a group of

approximately twenty members of the Somali Armed Forces came to the family's home. They kicked down the door and entered the house. They asked the family about the clan to which they belonged. The soldiers replied that they were going to kill all the members of the Isaaq clan that day. The soldiers then grabbed Mohamed Deria Ali and dragged him out of the house. The family never saw him again.

42. Later that afternoon, the same group of soldiers returned to the family's home. The soldiers told the family that their father, Mohamed Deria Ali, had been killed. They then grabbed Mustafa Mohamed Deria and dragged him out of the house. The family never saw Mustafa Mohamed Deria again.

Plaintiffs John Doe I and Aziz Mohamed Deria, in his capacity as personal representative of the estates of James Doe I and James Doe II

43. In or about December 1984, John Doe I, along with two of his brothers, Decedents James Doe I and James Doe II, and a young nephew were tending the family's camels in the rural areas around Burao, a small city in the north of Somalia. A large group of soldiers from the Somali Armed Forces, followed by military vehicles, approached them. The soldiers interrogated them about SNM activity in the area the previous evening. When they denied having any knowledge of SNM activities, they were forced into one of the military truck and taken to the military installation in the village of Magaaloyar.

44. That night, John Doe I and his brothers, James Doe I and James Doe II, were ordered into a small hut made of thorns in the middle of the military base. He and his brothers were ordered to lie down on their chests. They were then tied into

the "Mig" position, their bodies arched backward in a slightly-tilted U shape, causing them excruciating pain. The soldiers also beat them with guns and kicked them. When the soldiers were tired, the soldiers threw John Doe I and his brothers, still tied in the "Mig" position, into the back of an army truck. They were transported to the military base in the city of Burao.

45. At Burao, the soldiers untied John Doe I and his brothers, James Doe I and James Doe II, and ordered them out of the truck. They were directed to enter an office, one by one, where they were questioned by military officers. John Doe I was asked his name, age, and place of arrest. He was also interrogated at length about SNM activities in the Burao area. His answers were recorded in a register. He was then ordered to wait outside the office. His two brothers were similarly interrogated.

46. There were taken to a very small cell that already contained eleven prisoners. John Doe I was handcuffed to one prisoner already in the cell, and his two brothers, James Doe I and James Doe II, were handcuffed together. The cell had no windows or toilet, and the men were forced to urinate and defecate on the floor where they slept. They received one small meal of cooked rice in mid-afternoon.

47. The next day, John Doe I, his brothers, James Doe I and James Doe II, and ten other prisoners were ordered out of the cell, loaded onto a military truck and taken, with armored vehicles as escorts, to the military court in Burao. Two of the soldiers who had detained John Doe I and his brothers testified that the brothers had hidden SNM fighters and probably were themselves members of the SNM. The brothers'

attorney, whom they had met for the first time only at the start of the trial, argued that the brothers were innocent. The presiding judge closed the hearing, and the thirteen men, including John Doe I and his brothers were returned to their small cell in the military base.

48. Four days later, all the prisoners detained at the military base, approximately eighty men, including John Doe I and his brothers, James Doe I and James Doe II, were ordered out of their cells and taken to the courthouse. The road to the courthouse was heavily guarded by military vehicles. The presiding judge called the names of the first forty-five prisoners, including John Doe I and his brothers, and sentenced each to death, with the sentence to be executed immediately.

49. The prisoners to be executed were then directed out of the courthouse into army trucks waiting at the courthouse. A commander was standing at the truck, monitoring the count of prisoners. As John Doe I and his brothers James Doe I and James Doe II entered the truck, the commander asked John Doe I whether the three men were brothers. When John Doe I answered yes, the commander untied John Doe I from his brothers, led him to the front of the gate around the courthouse, and ordered the guard at the gate to let him escape.

50. As John Doe I ran down the road away from the courthouse, he was passed by the truck carrying the condemned prisoners, including his two brothers. The truck was heading for the road to the Burao airport, a well-known execution site. As he reached his brother's house, he heard the sound of gunshots and saw many people running toward the airport.

His two brothers, James Doe I and James Doe II, were among the men executed.

51. Later that night, John Doe I was told that the paramilitary forces were searching for him because he had been illegally released. He therefore fled Burao on foot to the remote village of Shanshacade, and then headed to the rural settlement area of Urruraha where his extended family, including the families of his two dead brothers, lived. He subsequently moved the extended family for safety to a refugee camp in Ethiopia. John Doe I remained in northern Somalia.

Plaintiff Jane Doe

52. One night in or around July 1985, Jane Doe, a student at Farah Omar Secondary School, was at home with her family in Hargeisa. Several NSS agents arrived at her house, banged on the door and then kicked in the door. She and other members of her family were taken to NSS headquarters. They were detained there for one week. She was accused of being a "subversive leader" for her alleged support of the Somali National Movement.

53. A few days later, Jane Doe was taken to the headquarters of the 26th Military Sector, the headquarters for all military and security forces in the northern region of Somali. She was held in a very small cell with one other woman. Her arms were tied behind her back with wire and then chained to the wall. Her left leg was chained to the floor. She was given food only once a day at 7:00 p.m. The cell was always completely dark. She was detained at the 26th Military Sector headquarters in this manner for three months.

54. Jane Doe was regularly interrogated during her detention at the Military Sector headquarters. Each time, she was taken to a small room not far from her cell. She was subjected to continuing torture as the solders attached very tight clips to her nipples.

55. During her detention at the 26th Military Sector headquarters, Jane Doe was also raped at least fifteen times. On each occasion, she was taken from her cell and locked in a room. Although the room was dark, she could see that her rapist was wearing a camouflage uniform. Like other girls in Somalia, Jane Doe had been subject to the practice of infibulation, a procedure whereby her vagina had been sewn closed except for a very tiny hole through which urine and menstrual blood could flow. Her rapist opened her vagina by cutting through her skin with the part of a fingernail clipper used for cleaning under the fingernails. Throughout this period, and after, Jane Doe suffered constant and severe physical pain. She never received medical attention for her injuries.

56. Months later, Jane Doe, along with the six other high school students who had been detained at the same time, was taken from her cell, loaded into an open Army truck with a net across the top and taken to the National Security Court. The courthouse was entirely surrounded by Army tanks and soldiers with machine guns.

57. At her trial, Jane Doe was not permitted defense counsel nor was evidence presented against her. The following day, the National Security Court sentenced her to life in prison. She was immediately taken by Army soldiers to a truck waiting outside the

courthouse, where the soldiers severely beat her. Because of this beating, she could not stand or walk for months.

58. She was then taken to Hargeisa Central prison. She was held alone in a very small cell measuring approximately 3½ feet by 5½ feet. Her hands were tied together in front of her at all times. She remained in solitary confinement for the next three and a half years.

59. In November 1989, Jane Doe and three other women prisoners were taken to Mogadishu in an Army airplane. On the sixth night after their arrival, they were taken by Army soldiers to the presidential villa to see Major General Siad Barre. Barre asked Jane Doe why she supported the SNM. Barre then told Jane Doe to stay away from the SNM and released her from prison, but he ordered her not to leave the country.

60. After her release, Jane Doe fled Somalia. She remained with her family in a refugee camp in Ethiopia for two years. She returned to Somalia in 1991, and later immigrated to the United Kingdom.

Plaintiff John Doe II

61. During the Spring of 1988, John Doe II, a non-commissioned Isaaq officer in the Somali National Army, was assigned to the Hargeisa Department of Public Works to help with the repair of the Hargeisa airport.

62. In or around June 1988, John Doe II was arrested by an Army officer and three Red Berets while working near a small town about 50 kilometers from Hargeisa. He was immediately taken to the headquarters of the 26th Military Sector. There, he

saw many other Isaaq Army officers with whom he had served in the nearby towns of Gebiley and Dararweine. He realized that they were being detained by the Somali Army for fear that they would desert and join the opposition Somali National Movement.

63. The next day, around 4:00 p.m., Army soldiers began taking prisoners in groups of four from the 26th Military Sector headquarters. They were taken and executed near the banks of the river that runs through the center of Hargeisa, just a mile away from the military headquarters. This well-known execution site was known as Malko Dur-Duro.

64. Around 6:30 p.m., Army soldiers took John Doe II and three other Isaaq officers from their cell and drove them to Malko Dur-Duro. A group of Army officers, Army soldiers and Red Berets were waiting at the execution site. John Doe II and the other Isaaq officers were told to stand between two poles located at the edge of the river. An Army officer ordered the Red Beret soldiers to shoot the prisoners. The Red Berets shot at the men and they all fell backward into the riverbed. John Doe II received only flesh wounds and briefly fell unconscious. When he awoke, he found himself lying among the dead bodies. He remained there, covered by dead bodies, until the mass execution was completed and the soldiers had left the area. He subsequently fled Hargeisa and did not return until 1991.

GENERAL ALLEGATIONS

65. The acts described herein were carried out under actual or apparent authority or color of law of the government of Somalia. The acts of torture, extrajudicial killings, attempted extrajudicial killings,

rape, arbitrary detention, and cruel, inhuman or degrading punishment or treatment inflicted upon Plaintiffs and Decedents were part of a pattern and practice of widespread or systematic human rights violations committed against the civilian population in Somalia from 1980 to 1990, and contrary to customary international law and the laws and customs of war, for which Defendant Samantar, acting as Minister of Defense, and later as Prime Minister, bears responsibility.

66. At all relevant times between 1980 and 1987, Defendant Samantar, as Minister of Defense, possessed and exercised command and effective control over the Armed Forces of Somalia. He also acquiesced in and permitted persons or groups acting in coordination with the Armed Forces, or under their control, to commit human rights abuses. Defendant Samantar knew or should have known that his subordinates had committed, were committing, or were about to commit extrajudicial killings; attempted extrajudicial killings; torture; crimes against humanity; war crimes; cruel, inhuman, or degrading treatment; or arbitrary detentions.

67. At all relevant times between 1980 and 1987, Defendant Samantar, as Minister of Defense, had the legal authority and practical ability to exert control over subordinates in the Armed Forces, or persons or groups acting in coordination with the Armed Forces, or under their control, who participated in the extrajudicial killings of Decedents James Doe I and James Doe II, and the abuses against Plaintiffs Bashe Abdi Yousuf, John Doe I, and Jane Doe. Defendant Samantar's command over such forces included the authority and responsibility to give

orders to, set policy for, and manage the affairs of, the forces under his control, and to appoint, remove and discipline personnel of such forces. Furthermore, Defendant Samantar had the actual authority and practical ability to investigate abuses, prevent their commission, and punish those responsible.

68. At all relevant times between 1980 and 1987, as Minister of Defense, Defendant Samantar had a duty under customary international law and multilateral treaties to ensure the protection of civilians, to prevent violations of international law by the Armed Forces, and to ensure that all persons under his command were trained in, and complied with, the laws of warfare and international law, including the prohibitions against torture, extrajudicial killing, rape, arbitrary detention, cruel, inhuman or degrading treatment or punishment, war crimes and crimes against humanity. Furthermore, Defendant Samantar was under a duty to investigate, prevent and punish violations of international law committed by the members of the Armed Forces under his command.

69. At all relevant times between 1980 and 1987, Defendant Samantar failed or refused to take all necessary measures to investigate and prevent these abuses, or to punish personnel under his command for committing such abuses.

70. At all relevant times between 1980 and 1987, Defendant Samantar failed or refused to take all necessary measures to investigate and prevent these abuses, or to punish personnel under his command for committing such abuses. Defendant Samantar knew or should have known that his subordinates had committed, were committing, or were about to

commit extrajudicial killings; attempted extrajudicial killings; torture; crimes against humanity; war crimes; cruel, inhuman, or degrading treatment; or arbitrary detentions.

71. At certain relevant times between 1987 and 1990, Defendant Samantar, as Prime Minister, possessed and exercised command and effective control over the Armed Forces of Somalia. At times he also acquiesced in and permitted persons or groups acting in coordination with the Armed Forces, or under their control, to commit human rights abuses. In particular, he was in Hargeisa in May and June of 1988 and had command of the Somali Armed Forces that were engaged in the indiscriminate attack upon the civilian population of the city of Hargeisa. Defendant Samantar knew or should have known that his subordinates had committed, were committing, or were about to commit extrajudicial killings; attempted extrajudicial killings; torture; crimes against humanity; war crimes; cruel, inhuman, or degrading treatment; or arbitrary detentions.

72. At certain relevant times between 1987 and 1990, Defendant Samantar, as Prime Minister of Somalia, had the legal authority and practical ability to exert control over subordinates in the Armed Forces, or person or groups acting in coordination with the Armed Forces or under their control, who participated in the extrajudicial killings of Decedents Mohamed Deria Ali and Mustafa Deria and the abuses against Plaintiffs Bashe Abdi Yousuf, John Doe I, Jane Doe, and John Doe II. In particular, he was in Hargeisa in May and June of 1988 and had command of the Somali Armed Forces that were engaged in the indiscriminate attack upon the

civilian population of the city of Hargeisa. Furthermore, Defendant Samantar had the actual authority and practical ability to investigate abuses, prevent their commission, and punish those responsible.

73. At all relevant times between 1987 and 1990, as Prime Minister of Somalia, Defendant Samantar had a duty under customary international law and multilateral treaties to ensure the protection of civilians, to prevent violations of international law by the Armed Forces, and to ensure that all persons under his command were trained in, and complied with, the laws of warfare and international law, including the prohibitions against torture, extrajudicial killing, attempted extrajudicial killing, arbitrary detention, cruel, inhuman or degrading treatment or punishment, war crimes and crimes against humanity. Furthermore, Defendant Samantar was under a duty to investigate, prevent and punish violations of international law committed by the members of the Armed Forces under his authority.

74. At all relevant times between 1987 and 1990, Defendant Samantar failed or refused to take all necessary measures to investigate and prevent these abuses, or to punish personnel under his command for committing such abuses.

75. The acts of torture, extrajudicial killing, attempted extrajudicial killing, rape, arbitrary detention, and cruel, inhuman or degrading treatment or punishment inflicted upon Plaintiffs and Decedents between 1980 and 1990 were part of a pattern and practice of widespread or systematic human rights violations against the civilian

population of Somalia and contrary to the law and customs of war. At all relevant times, the persons who carried out these acts knew or reasonably should have known that the acts were part of a widespread or systematic attack against a civilian population. At all relevant times, Defendant Samantar knew or reasonably should have known of the pattern or practice of gross human rights abuses perpetrated against the civilian population by subordinates under his command.

76. Defendant Samantar failed or refused to take all necessary measures to investigate and prevent these abuses, or to punish personnel under his command for committing such abuses.

77. Defendant Samantar, both as Minister of Defense and as Prime Minister, conspired with, or aided and abetted members of the Armed Forces or persons or groups acting in coordination with the Armed Forces or under their control to commit acts of torture, extrajudicial killing, attempted extrajudicial killing, rape, arbitrary detention, cruel, inhuman or degrading treatment or punishment, war crimes and crimes against humanity, and to cover up these abuses.

78. The attempted acts of torture, extrajudicial killing, attempted extrajudicial killing, rape, arbitrary detention, cruel, inhuman or degrading treatment or punishment, war crimes and crimes against humanity described herein were a part of an organized system of repression and ill-treatment against members of the Isaaq clan.

79. Defendant Samantar had knowledge of and was an active participant in the enforcement of this

system of-repression and ill-treatment against members of the Isaaq clan.

80. Moreover, it was the intent of Defendant Samantar while he was the Minister of Defense and while he was the Prime Minister to further this system of repression and ill-treatment.

81. Additionally, the acts of torture, extrajudicial killing, attempted extrajudicial killing, rape, arbitrary detention, cruel, inhuman or degrading treatment or punishment, war crimes and crimes against humanity described herein were natural and foreseeable consequences of a common, shared design on the part of the leaders of the Barre regime and the Anned Forces of Somalia to rid the northern region of Somalia of members of the Isaaq clan, and to engage in a systematic attack against civilian populations.

82. The civilian populations targeted by this joint criminal enterprise included, but were not limited to, members of the Isaaq clan.

83. Defendant Samantar intended to participate in this common design and was reckless or indifferent to the risk that acts of torture, extrajudicial killing, attempted extrajudicial killing, rape, arbitrary detention, cruel, inhuman or degrading treatment or punishment, war crimes and crimes against humanity would occur during the effecting of that common purpose.

Equitable Tolling of the Statute of Limitations

84. Defendant Samantar has resided in the United States only since 1997. Before that time, neither this court, nor any other United States court, could exercise jurisdiction over Samantar for claims relating to the actions described herein. For this

reason, the statute of limitations for these claims was tolled until 1997.

85. Also, prior to 1997, Isaaq victims of human rights abuses committed in the 1980s by the Somali Armed Forces, or persons or groups acting in coordination with the Somali Armed Forces or under their control, could not have been expected to pursue a cause of action in the United States. Until approximately 1997, victims' reasonable fear of reprisals against themselves or members of their families still residing in Somalia served as an insurmountable deterrent to such action. Also, until approximately 1997, it would not have been possible to conduct safely investigation and discovery in Somalia in support of such a case.

86. Throughout the 1990s, Somalia fell into increasing chaos. Following the violent defeat of the military government in 1991, Somalia's central government collapsed. Fighting among rival clan leaders resulted in the killing, displacement, and mass starvation of tens of thousands of Somali citizens. The ensuing chaos led the United Nations to intervene militarily in 1992, though it proved incapable of restoring even a minimum level of order. Somalia's clan-based civil war and anarchic violence proved to be so brutal that it drove the United Nations from the country in 1994. Rival clan militias continued to commit gross and systematic human rights abuses in the years after the United Nations' departure, including the deliberate killing and kidnapping of civilians because of their clan membership.

87. During these years, conditions in Somalia precluded human rights cases against former

commanders of the Somali Armed Forces from being brought either in Somalia or the United States or elsewhere. Throughout the time period alleged in the complaint, and up to the present, each of the Plaintiffs either lived in Somalia or had immediate family still residing there. No national government existed in Somalia to protect them from the continuing clan-based violence. Gross and systematic human rights violations openly committed by rival clans had a further chilling effect. Pursuit of human rights claims, even in the United States, would have exposed victims and their families to acts of retribution that discouraged them from pursuing such a course. Witnesses also reasonably feared acts of reprisal for assisting in such cases.

88. The return of stability sufficient to permit victims of Barre-era human rights abuses to come forward has been a slow and uneven process. Stable conditions still do not exist in most regions of the country. It took until approximately 1997 for even one region to establish the conditions that permitted victims to consider bringing their claims.

89. This region, the former British protectorate of Somaliland, is dominated by the Isaaq clan. In 1991, it declared its independence, reclaimed its previous name, and seceded from Somalia. A rudimentary civil administration was established there in 1993, but major armed conflicts in 1994 and 1996 plunged the region back into turmoil. Since about 1997, Somaliland's government has exercised a modicum of authority over its territory. Nonetheless, conditions remain dangerous and unstable throughout the country. Clan allegiances are still very strong, violence is still a daily possibility, and fear of clan-

based repercussions is still of paramount concern to the anonymous plaintiffs of this case.

Absence of Remedies in Somalia

90. Somalia remains without a functioning national government and national judicial system in which victims of Barre-era human rights abuses could bring their claims. Shari'a courts operate in some regions of the country, filling the vacuum created by the absence of governmental authority, but such courts impose religious and local customary law often in conflict with universal human rights conventions. Somalia still does not have a functioning national government with a court system capable of reviewing human rights abuses committed by the military government in the 1980s. The country remains under the de facto control of competing clan leaders, warlords and criminal gangs, many of whom commit or countenance the commission of serious human rights abuses.

91. Somaliland does not offer a forum in which victims of human rights abuses can bring their claims. Although civil order has prevailed there since 1997, it remains impossible to seek judicial remedies in its courts for such claims. The Somaliland government's human rights record is weak, and human rights activists are frequently arrested and detained. The judicial system remains very tied to religious and political elites and lacks properly trained judges and other legal personnel. Furthermore, no former members of the Barre government reside within Isaaq-dominated Somaliland. Thus the people who should be held accountable reside beyond the jurisdictional reach of the Somaliland courts. Accordingly, there were and

are no adequate and available remedies for Plaintiffs to exhaust in Somalia.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

(Extrajudicial Killing—Plaintiff Aziz Deria, in his capacity as the personal representative of the estates of the decedents)

92. Plaintiff Aziz Deria realleges and incorporates by reference the allegations set forth in paragraphs 1 through 85 as if fully set forth herein.

93. The extrajudicial killings of Decedents Mohamed Deria Ali and Mustafa Mohamed Deria (father and brother of Plaintiff Aziz Mohamed Deria) and of Decedents James Doe I and James Doe II (brothers of Plaintiff John Doe I) constitute extrajudicial killings as defined by the Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 Note). Additionally, the extrajudicial killing of Decedents Mohamed Deria Ali, Mustafa Mohamed Deria, James Doe I, and James Doe II constitute "tort[s] . . . committed in violation of the law of nations or a treaty of the United States" under the Alien Tort Statute, 28 U.S.C. § 1350, in that they were in violation of customary international law prohibiting extrajudicial killing as reflected, expressed, defined, and codified in multilateral treaties and other international instruments, international and domestic judicial decisions and other authorities.

94. The extrajudicial killings of Mohamed Deria Ali, Mustafa Mohamed Deria; James Doe I and James Doe II were not authorized by a judgment pronounced by a regularly constituted court affording

all the judicial guarantees which are recognized as indispensable by civilized peoples.

95. Defendant Samantar exercised command responsibility over, conspired with, or aided and abetted members of the Armed Forces, or persons or groups acting in coordination with the Armed Forces or under their control, to murder Mohamed Deria Ali, Mustafa Mohamed Deria, James Doe I and James Doe II. Furthermore, Defendant Samantar knew or should have known that his subordinates had committed, were committing, or were about to commit human rights abuses, and he failed to prevent the abuses or to punish those responsible.

96. Moreover, defendant Samantar was an active participant in the joint criminal enterprise that resulted in the murders of Mohamed Deria Ali, Mustafa Mohamed Deria, James Doe I and James Doe II.

97. Defendant Samantar's acts or omissions described above and the acts committed by his subordinates, caused the extrajudicial killings of Mohamed Deria Ali, Mustafa Mohamed Deria, James Doe I and James Doe II, and caused family members of the decedents to suffer.

98. Defendant Samantar's acts or omission described above and the acts committed by his subordinates against Decedents Mohamed Deria Ali, Mustafa Mohamed Deria, James Doe I and James Doe II were committed under actual or apparent authority, or color of law, of the government of Somalia.

99. As a result of the extrajudicial killings of Mohamed Deria Ali, Mustafa Mohamed Deria, James Doe I and James Doe II, Plaintiff Aziz Deria, in his

capacity as personal representatives of the estates of the decedents, is entitled to damages in an amount to be determined at trial.

100. Defendant Samantar's acts were deliberate, willful, intentional, wanton, malicious, and oppressive and should be punished by an award of punitive damages in an amount to be determined at trial.

SECOND CLAIM FOR RELIEF

(Attempted Extrajudicial Killing—Plaintiff John Doe II)

101. Plaintiff John Doe II realleges and incorporates by reference the allegations set forth in paragraphs 1 through 93 as if fully set forth herein.

102. The attempted extrajudicial killing of Plaintiff John Doe II constitutes an attempt to commit an extrajudicial killing as defined by the Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 Note). Additionally, the attempted extrajudicial killing of Plaintiffs John Doe II constitutes a "tort . . . committed in violation of the law of nations or a treaty of the United States" under the Alien Tort Statute, 28 U.S.C. § 1350, in that it was in violation of customary international law prohibiting extrajudicial killings as reflected, expressed, defined, and codified in multilateral treaties and other international instruments, international and domestic judicial decisions and other authorities.

103. The attempted extrajudicial killing of John Doe II was not authorized by a judgment pronounced by a regularly constituted court affording all the

judicial guarantees which are recognized as indispensable by civilized peoples.

104. Defendant Samantar exercised command responsibility over, conspired with, or aided and abetted members of the Armed Forces, or persons or groups acting in coordination with the Armed Forces or under their control, in their attempts to extrajudicially kill John Doe II. Furthermore, Defendant Samantar knew or should have known that his subordinates had committed, were committing, or were about to commit human rights abuses, and he failed to prevent the abuses or to punish those responsible.

105. Moreover, defendant Samantar was an active participant in the joint criminal enterprise that resulted in the attempted extrajudicial killing of Plaintiff John Doe II.

106. Defendant Samantar's acts or omissions described above and the acts committed by his subordinates against Plaintiff John Doe II were committed under actual or apparent authority, or color of law, of the government of Somalia.

107. Defendant Samantar's acts or omissions described above and the acts committed by his subordinates, caused the attempted extrajudicial killing of John Doe II, and caused him to suffer.

108. As a result of these attempts to kill him extrajudicially, John Doe II is entitled to damages in an amount to be determined at trial.

109. Defendant Samantar's acts were deliberate, willful, intentional, wanton, malicious, and oppressive and should be punished by an award of

punitive damages in an amount to be determined at trial.

THIRD CLAIM FOR RELIEF

(Torture—Plaintiffs Bashe Abdi Yousuf, John Doe I, Jane Doe and John Doe II)

110. Bashe Abdi Yousuf, John Doe I, Jane Doe and John Doe II reallege and incorporate by reference the allegations set forth in paragraphs 1 through 109 as if fully set forth herein.

111. The acts described herein constitute torture as defined by the Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 Note). Additionally, these acts constitute "tort[s] . . . committed in violation of the law of nations or a treaty of the United States" under the Alien Tort Statute, 28 U.S.C. § 1350, in that they were in violation of customary international law prohibiting torture as reflected, expressed, defined, and codified in multilateral treaties and other international instruments, international and domestic judicial decisions and other authorities.

112. The acts described herein were inflicted deliberately and intentionally upon Bashe Abdi Yousuf, John Doe I, Jane Doe and John Doe II for purposes that include, among others, intimidating or coercing them, discriminating against them for their presumed political beliefs, or discriminating against them for their membership in a specific ethnic group.

113. The torture of Bashe Abdi Yousuf, John Doe I, Jane Doe and John Doe II did not arise from, and was not inherent in or incidental to, lawful sanctions.

114. Defendant Samantar exercised command responsibility over, conspired with, or aided and

abetted members of the Armed Forces, or persons or groups acting in coordination with the Armed Forces or under their control, to torture Bashe Abdi Yousuf, John Doe I, Jane Doe and John Doe II. Furthermore, Defendant Samantar knew or should have known that his subordinates had committed, were committing, or were about to commit human rights abuses, and he failed to prevent the abuses or to punish those responsible.

115. Moreover, defendant Samantar was an active participant in the joint criminal enterprise that resulted in the torture of Bashe Abdi Yousuf, John Doe I, Jane Doe and John Doe II.

116. Defendant Samantar's acts or omissions described above and the acts committed by his subordinates against Bashe Abdi Yousuf, John Doe I, Jane Doe and John Doe II were committed under actual or apparent authority, or color of law, of the government of Somalia.

117. Defendant Samantar's acts or omissions described above and the acts committed by his subordinates, caused the torture of Bashe Abdi Yousuf, John Doe I, Jane Doe and John Doe II and caused them to suffer severe physical and mental pain and suffering.

118. As a result of their torture, Bashe Abdi Yousuf, John Doe I, Jane Doe and John Doe II are entitled to damages in an amount to be determined at trial.

119. Defendant Samantar's acts were deliberate, willful, intentional, wanton, malicious, and oppressive and should be punished by an award of punitive damages in an amount to be determined at trial.

FOURTH CLAIM FOR RELIEF

(Cruel, Inhuman or Degrading Treatment or Punishment—Plaintiffs John Doe I, Jane Doe and John Doe II)

120. John Doe I, Jane Doe and John Doe II reallege and incorporate by reference the allegations set forth in paragraphs 1 through 119 as if fully set forth herein.

121. The acts described herein constitute "tort[s] . . . committed in violation of the law of nations or a treaty of the United States" under the Alien Tort Statute, 28 U.S.C. § 1350, in that they were in violation of customary international law prohibiting cruel, inhuman or degrading punishment or treatment as reflected, expressed, defined, and codified in multilateral treaties and other international instruments, international and domestic judicial decisions and other authorities.

122. The acts of cruel, inhuman or degrading treatment or punishment described herein had the intent and effect of inflicting severe or serious physical or mental pain or suffering upon John Doe I, Jane Doe and John Doe II. As an intended result of these acts, John Doe I, Jane Doe and John Doe II suffered severe or serious physical or mental pain or suffering.

123. The cruel, inhuman, or degrading treatment or punishment of John Doe I, Jane Doe and John Doe II did not arise from, and was not inherent in or incidental to, lawful sanctions.

124. Defendant Samantar exercised command responsibility over, conspired with, or aided and abetted subordinates in the Armed Forces, or persons

or groups acting in coordination with the Armed Forces or under their control, to inflict cruel, inhuman or degrading treatment or punishment upon John Doe I, Jane Doe and John Doe II. Furthermore, Defendant Samantar knew or should have known that his subordinates had committed, were committing, or were about to commit human rights abuses, and he failed to prevent the abuses or to punish those responsible.

125. Moreover, defendant Samantar was an active participant in the joint criminal enterprise that resulted in the cruel, inhuman or degrading treatment or punishment of John Doe I, Jane Doe and John Doe II.

126. Defendant Samantar's acts or omissions described above and the acts committed by his subordinates against John Doe I, Jane Doe and John Doe II, were committed under actual or apparent authority, or color of law, of the government of Somalia.

127. Defendant Samantar's acts or omissions described above and the acts committed by his subordinates, caused the cruel, inhuman or degrading treatment or punishment of John Doe I, Jane Doe and John Doe II and caused them to suffer severe or serious physical or mental pain or suffering.

128. As a result of the cruel, inhuman or degrading treatment or punishment described above, John Doe I, Jane Doe and John Doe II are entitled to damages in an amount to be determined at trial.

129. Defendant Samantar's acts were deliberate, willful, intentional, wanton, malicious, and oppressive and should be punished by an award of

punitive damages in an amount to be determined at trial.

FIFTH CLAIM FOR RELIEF

(Arbitrary Detention—Plaintiffs John Doe I, Jane Doe and John Doe II)

130. Plaintiffs John Doe I, Jane Doe and John Doe II reallege and incorporate by reference the allegations set forth in paragraphs 1 through 129 as if fully set forth herein.

131. The arbitrary detentions of Plaintiffs John Doe I, Jane Doe and John Doe II described herein constitute "tort[s] . . . committed in violation of the law of nations or a treaty of the United States" under the Alien Tort Statute, 28 U.S.C. § 1350, in that they were in violation of customary international law prohibiting arbitrary detention as reflected, expressed, defined, and codified in multilateral treaties and other international instruments, international and domestic judicial decisions and other authorities.

132. John Doe II was detained without warrant, probable cause, or articulable suspicion and was never provided due process protections.

133. John Doe I and Jane Doe were detained without warrant, probable cause, or articulable suspicion and were sentenced by courts that failed to accord them due process protections.

134. Defendant Samantar exercised command responsibility over, conspired with, or aided and abetted members of the Armed Forces, or persons or groups acting in coordination with the Armed Forces or under their control, to arbitrarily detain John Doe I, Jane Doe and John Doe II. Furthermore,

Defendant Samantar knew or should have known that his subordinates had committed, were committing, or were about to commit human rights abuses, and he failed to prevent the abuses or to punish those responsible.

135. Moreover, defendant Samantar was an active participant in the joint criminal enterprise that resulted in the arbitrary detentions of John Doe I, Jane Doe and John Doe II.

136. Defendant Samantar's acts or omissions described above and the acts committed by his subordinates against John Doe I, Jane Doe and John Doe II were committed under actual or apparent authority, or color of law, of the government of Somalia.

137. As a result of their arbitrary detention as described above, John Doe I, Jane Doe and John Doe II are entitled to damages in an amount to be determined at trial.

138. Defendant Samantar's acts were deliberate, willful, intentional, wanton, malicious, and oppressive and should be punished by an award of punitive damages in an amount to be determined at trial.

SIXTH CLAIM FOR RELIEF

(Crimes Against Humanity—Plaintiffs Aziz Mohamed Deria, (in his capacity as personal representative of the estates of the decedents) John Doe I, Jane Doe and John Doe II)

139. Plaintiffs Aziz Mohamed Deria, in his capacity as personal representative of the decedents, John Doe I, Jane Doe and John Doe II reallege and incorporate

by reference the allegations set forth in paragraphs 1 through 138 as if fully set forth herein.

140. The extrajudicial killings of Mohamed Deria Ali, Mustafa Mohamed Deria, James Doe I and James Doe II; the torture of John Doe I, Jane Doe and John Doe II; the rape of Jane Doe; the cruel, inhuman, or degrading treatment or punishment of John Doe I, Jane Doe and John Doe II; and the arbitrary detentions of John Doe I, Jane Doe and John Doe II described herein constitute "tort[s] . . . committed in violation of the law of nations or a treaty of the United States" under the Alien Tort Statute, 28 U.S.C. § 1350, in that they were in violation of customary international law prohibiting crimes against humanity as reflected, expressed, defined, and codified in multilateral treaties and other international instruments, international and domestic judicial decisions and other authorities.

141. These acts were committed as part of a widespread or systematic attack against a civilian population.

142. These acts were committed by members of the Armed Forces, or persons or groups acting in coordination with the Armed Forces or under their control. The persons who carried out these acts knew or reasonably should have known that the acts were part of a widespread or systematic attack against a civilian population. Defendant Samantar knew or reasonably should have known of the pattern or practice of gross human rights abuses perpetrated against the civilian population by the subordinates under his command.

143. Defendant Samantar exercised command responsibility over, conspired with, or aided and

abetted members of the Armed Forces, or persons or groups acting in coordination with the Armed Forces or under their control, to commit crimes against humanity, including the extrajudicial killings of Mohamed Deria Ali, Mustafa Mohamed Deria, James Doe I and James Doe II; the torture of John Doe I, Jane Doe and John Doe II; the attempted extrajudicial killings of John Doe II, the rape of Jane Doe; the cruel, inhuman, or degrading treatment or punishment of John Doe I, Jane Doe and John Doe II; and the arbitrary detentions of John Doe I, Jane Doe and John Doe II. Furthermore, Defendant Samantar knew or should have known that his subordinates had committed, were committing, or were about to commit human rights abuses and that they were being committed as part of a widespread or systematic attack on civilians, and he failed to prevent the abuses or to punish those responsible.

144. Moreover, defendant Samantar was an active participant in the joint criminal enterprise that resulted in the crimes against humanity described herein.

145. Defendant Samantar's acts or omissions described above, and the acts committed by his subordinates, were committed under actual or apparent authority, or color of law, of the government of Somalia.

146. As a result, Plaintiffs Aziz Mohamed Deria (in his capacity as the personal representative of the estates of the decedents), John Doe I, Jane Doe and John Doe II are entitled to damages in an amount to be determined at trial.

147. Defendant Samantar's acts were deliberate, willful, intentional, wanton, malicious, and

oppressive and should be punished by an award of punitive damages in an amount to be determined at trial.

SEVENTH CLAIM FOR RELIEF

(War Crimes—Plaintiffs Aziz Mohamed Deria, (in his capacity as personal representative of the estates of the decedents), John Doe I, Jane Doe and John Doe II)

148. Plaintiffs Aziz Mohamed Deria, (in his capacity as personal representative of the estates of the decedents), John Doe I, Jane Doe, and John Doe II reallege and incorporate by reference the allegations set forth in paragraphs 1 through 147 as if fully set forth herein.

149. The attempted extrajudicial killing; extrajudicial killings, torture; rape, cruel, inhuman, or degrading treatments or punishments; and arbitrary detentions described herein constitute "tort[s] . . . committed in violation of the law of nations or a treaty of the United States" under the Alien Tort Statute, 28 U.S.C. § 1350, in that they were in violation of customary international law prohibiting war crimes as reflected, expressed, defined, and codified in multilateral treaties and other international instruments, international and domestic judicial decisions and other authorities.

150. These acts were committed during the armed conflict between the SNM and the Armed Forces of Somalia.

151. This armed conflict bound Defendant Samantar to follow the obligations of Common Article 3 of Geneva Conventions of 1949 and the customary norms of internal armed conflict.

152. Defendant Samantar exercised command responsibility over, conspired with, or aided and abetted members of the Armed Forces, or persons or groups acting in coordination with the Armed Forces or under their control, to commit war crimes, including the attempted extrajudicial killings; extrajudicial killings, torture; rape, cruel, inhuman or degrading treatments or punishments; and arbitrary detention, suffered by Plaintiffs and decedents during the armed conflict in northern Somalia. Furthermore, Defendant Samantar knew or should have known that his subordinates had committed, were committing, or were about to commit human rights abuses, and he failed to prevent the abuses or to punish those responsible.

153. As a result of these acts, Plaintiffs Aziz Mohamed Deria (in his capacity as personal representative of the estates of the decedents), John Doe I, Jane Doe, and John Doe II are entitled to damages in an amount to be determined at trial.

154. Moreover, defendant Samantar was an active participant in the joint criminal enterprise that resulted in the war crimes described herein.

155. Defendant Samantar's acts were deliberate, willful, intentional, wanton, malicious, and oppressive and should be punished by an award of punitive damages in an amount to be determined at trial.

156. As a result of these acts, Plaintiffs Aziz Mohamed Deria (in his capacity as personal representative of the estates of the decedents), John Doe I, Jane Doe, and John Doe II are entitled to damages in an amount to be determined at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment against the Defendant as follows:

1. For compensatory damages according to proof;
2. For punitive and exemplary damages according to proof;
3. For prejudgment interest as allowed by law;
4. For attorneys' fees and costs of suit according to proof;
5. For any such other and further relief as the Court deems just and proper.

JURY TRIAL DEMANDED

The plaintiffs hereby demand a trial by jury.

Dated: February 22, 2007

BASHE ABDI YOUSUF,
AZIZ MOHAMED DERIA,
in his capacity as the personal representatives of the estate of Mohamed Deria Ali,
AZIZ MOHAMED DERIA, in his capacity as the personal representative of the estate of Mustafa Mohamed Deria,
JOHN DOE I,
AZIZ MOHAMED

DERIA, in his capacity as the personal representative of the estate of James Doe I (the deceased brother of John Doe I), AZIZ MOHAMED DERIA, in his capacity as the personal representative of the estate of James Doe II (the deceased brother of John Doe I), JANE DOE, and JOHN DOE II,

By Counsel

By:
s/

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CERTIFICATE OF SERVICE

I hereby certify, this 22nd day of February, 2007, that a true copy of the foregoing was sent by overnight delivery to the following counsel of record:

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Alexandria, VA 22314

Julian Henry Spirer, Esq.
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s/_____

Jamhuuriyadda Soomaaliya
Xukuumadda Federaalka KMG ah
Xafiska Ra'iisull Wasaaraha

[SEAL]

[Arabic symbols]

The Transitional Federal Government of the Somali Republic
Office of the Prime Minister

Ref: ODPM/020/07 February 17, 2007

The Honorable Dr. Condoleezza Rice
Secretary of State
U.S. Department of State
2201 C Street, NW
Washington, D.C. 20520

Dear Madame Secretary,

By letter to you dated February 10, 2005, then Foreign Minister Hon. Adbullahi Sheikh Ismail had the honor of conveying to you the thanks of the Transitional Federal Government for the support given by the Government of the United States towards our efforts to reestablish order and legitimacy in Somalia after so many years of civil war and anarchy.

We write now to renew those thanks in view of the difficult two years which have elapsed during which

time the continued support of the government of the United States has given great encouragement and has proven critical to our recent successes. We note specially our gratitude to Assistant Secretary Dr. Jendayi Frazer for her singular effort on our behalf.

In the previous letter, our Government also expressed its concern over the prosecution in a U.S. court of a lawsuit against a former Prime Minister and Head of Government Mohamed Ali Samantar. We requested that your Department initiate a statement of interest to request that the court dismiss this lawsuit as a violation of Mr. Samantar's immunity and as a threat to the reconciliation efforts then underway in Somalia.

We recently learned that the court is placing the lawsuit (*Yousuf v. Samantar*, No. 1:04 CV 1360, US Dist. Ct. for the E. Dist. Of Va.) back on its active docket. This event makes an expression of such interest that much more important.

We wish to indicate that the actions attributed to Mr. Samantar in the lawsuit in connection with the quelling of the insurgencies from 1981 to 1989 would have been taken by Mr. Samantar in his official capacities and to reaffirm Mr. Samantar's entitlement to sovereign immunity from prosecution for those actions.

We also wish to reemphasize the potential danger to the reconciliation process in Somalia of a lawsuit that would hold a flame to past events and revive old hostilities.

Let me underscore again our Government's debt of gratitude for the extraordinary work done by the U.S. Government in helping to restore stability to our country and add the prayer and belief that this process finally leads to the achievement of security and well being for all Somalis.

Sincerely,
s/_____
Salim Alio Ibro
Acting Prime Minister

cc: Hon. Dr. Jendayi Frazer
Assistant Secretary of State for African Affairs

[SEAL; DEPUTY PRIME MINISTER]

Jamhuuriyadda
Soomaaliya
Xukuumadda
Federaalka
KMG ah
Xafiska Ra'iisull
Wasaaraha

[SEAL]

[Arabic
symbols]

The Transitional Federal Government of the Somali Republic
Office of the Prime Minister

Ref. OPM/830/07 Mogadishu, April 26, 2007

The H.E. Honorable Dr. Condolezza Rice
Secretary of State
U.S. Department of State
2201 C Street, NW
Washington, D.C. 20520

Your Excellency, Madame Secretary,

I am writing this letter to convey in you the thanks of the Transitional Federal Government (TFG) for the support given by the Government of the United States towards our efforts to reestablish order and legitimacy in Somalia after so many years of civil war and anarchy.

The tireless support of the Government of the United States has given great encouragement and has proven critical to our recent successes. We note specially our gratitude to Assistant Secretary Dr. Jandayl Frazer for her singular efforts on our behalf and her recent visit to Somalia.

In a previous letter, our Government also expressed its concern over the prosecution in a U.S. court of a lawsuit against a former Vice President and Prime Minister Mr. Mohamed Ali Samantar. We are requesting your Department to initiate a statement of interest by informing that the court dismisses this lawsuit as a violation of Mr. Samantar's immunity and as a threat to the reconciliation efforts then underway in Somalia.

Even though state collapse and anarchy took place in our country, nevertheless the diplomatic immunities of the then Somali Government officials have not been removed.

We recently learned that the court is placing the lawsuit (*Yousuf v. Samantar*, No. 1:04 CV 1360, US Dist. Ct. for the e. Dist. Of Va.) back on its active docket. This event makes an expression of such interest that much more important.

We wish to indicate that the actions attributed to Mr. Samantar in the lawsuit in connection with the quelling of the insurgencies from 1981 to 1989 would have been taken by Mr. Samantar in his official capacities and to reaffirm Mr. Samantar's entitlement to sovereign immunity from prosecution for those actions.

We also wish to reemphasize the potential danger to the reconciliation process in Somalia of a lawsuit that would hold a flame to past events and revive old hostilities.

Let me underscore again our Government's debt of gratitude for the extraordinary work done by the U.S. government in helping to restore stability to our country and add the prayer and belief that this process finally leads to the achievement of security and well being for all Somalis.

Please accept, Your Excellency, the assurances of my highest consideration.

s/_____

Ali Mohamed Gedi [SEAL]
Prime Minister

REPUBLIC OF [SEAL] SOMALILAND

Ministry of Foreign Affairs

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REF:MFA/USA/2/3549/2007 2nd June 07

The Honorable Condoleezza Rice
Secretary of State
U.S. Department of State
2201 C Street NW
Washington, DC 20520

Dear Madame Secretary,

I send you greetings from Hargeisa on behalf of the people and government of Somaliland and convey to you our appreciation of the support that your government has been providing to our people over the many years that we have been engaged in establishing a sound system of democratic governance of Somaliland.

I have been provided a copy of a letter addressed to you by Mr. Ali Mohamed Gedi, dated April 26, 2007 concerning the matter of *Yousuf v. Samantar*, a human rights lawsuit pending in United States District Court for the Eastern District of Virginia.

I wish to reiterate statements made to you in previous letters submitted by my predecessor, Mrs. Edna Adan Ismail, dated March 3, 2005, in which she expressed the support of our government for this type of human rights case involving abuses

committed against the civilian population of the region now known as Somaliland.

To date, the people of this region have not seen accountability for the atrocities suffered under the command of former Prime Minister Mohamed Ali Samantar. An opportunity for accountability in the United States will help support efforts of democratic transition and promote reconciliation in the region, rather than hinder those efforts.

Mr. Ali Mohamed Gedi is a long time political ally of Mohamed Ali Samantar. His support for the dismissal of all allegations of human rights abuses against Mr. Samantar does not reflect a general consensus of the Somali people and as a leader in the Transitional Federal Government (TFG) of Somalia, he does not represent Somalilanders.

The allegations against Mr. Samantar in the human rights law suit do not concern official actions taken by the Somali government but rather serious human rights violations, including torture and killing of civilians, in violation of Somali and international law.

Thank you for your consideration of this letter and your continued support of the people and government of Somaliland.

Yours sincerely,

Abdillahi M. Duale s/_____ [SEAL: Republic of Somaliland Ministry of Foreign Affairs]
Minister

Cc: The President of the Republic of Somaliland
Hargeisa

PETITIONER'S BRIEF

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Supreme Court, U.S.
FILED
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No. 08-1555

IN THE

Supreme Court of the United States

MOHAMED ALI SAMANTAR,

Petitioner,

v.

BASHE ABDI YOUSUF ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF PETITIONER

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November 30, 2009

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TCTTA

QUESTIONS PRESENTED

Whether a foreign state's immunity from suit under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1604, extends to an individual acting in an official capacity on behalf of a foreign state.

Whether an individual who is no longer an official of a foreign state at the time suit is filed retains immunity under the FSIA for acts taken in the individual's former official capacity.

PARTIES TO THE PROCEEDING

The Petitioner is Mohamed Ali Samantar. Respondents are Bashe Abdi Yousuf, Aziz Mohamed Deria (in his capacity as Personal Representative of the Estates of Mohamed Deria Ali, Mustafa Mohamed Deria, James Doe I, and James Doe II), John Doe I, Jane Doe I, and John Doe II, who were also the parties in the Fourth Circuit proceeding.

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BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 552 F.3d 371. An order denying rehearing and rehearing en banc (Pet. App. 76a-77a) is unreported.

The district court's memorandum opinion granting Petitioner's motion to dismiss the second amended complaint (Pet. App. 30a-63a) is unreported but available electronically at 2007 WL 2220579. The accompanying order (Pet. App. 64a) is unreported.

JURISDICTION

The court of appeals entered judgment on January 8, 2009, and denied rehearing and rehearing en banc on February 2, 2009. On April 23, 2009, the Chief Justice granted Petitioner's application for an extension of time to file a petition for writ of certiorari until June 18, 2009. This Court granted the petition on September 30, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1330, 1602-1606, 1608 (Pet. App. 78a-95a), the Alien Tort Statute (ATS), 28 U.S.C. § 1350 (Pet. App. 96a), and the Torture Victim Protection Act of 1991 (TVPA), 28 U.S.C. § 1350 note (Pet. App. 97a-99a).

STATEMENT OF THE CASE

This case presents exceptionally important questions concerning the scope of federal jurisdiction over officials of foreign states. The FSIA plays a vital role in ensuring comity between the United States

and other nations, and it provides courts with a comprehensive framework for evaluating the immunity claims of foreign sovereigns. By permitting plaintiffs to circumvent the FSIA through suits against representatives of a foreign state for their official acts, the Fourth Circuit's decision threatens international relations and eviscerates Congress's carefully constructed framework immunizing foreign states.

A. Statutory Framework

The FSIA provides that "a foreign state shall be immune from the jurisdiction" of U.S. courts, 28 U.S.C. § 1604, unless a specified exception in the statute applies, *see* 28 U.S.C. §§ 1330, 1605-1607; *see also Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993).

The FSIA defines a "foreign state" as follows:

> (a) A "foreign state" . . . *includes* a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity—
>
> > (1) which is a separate legal person, corporate or otherwise, and
> >
> > (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
> >
> > (3) which is neither a citizen of a State of the United States as defined in

> section 1332(c) and (e) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603 (emphasis added).

Congress passed the FSIA to codify comprehensively the law concerning the immunity of foreign sovereigns and vest *all* immunity determinations in the courts, subject to substantive rules derived from customary international law at the time of the FSIA's enactment. *See, e.g.*, *Republic of Austria v. Altmann*, 541 U.S. 677, 699 (2004) (explaining that the FSIA "established a comprehensive framework for resolving *any* claim of sovereign immunity") (emphasis added).

Before passage of the FSIA, for more than 150 years, the United States "generally granted foreign sovereigns complete immunity from suit in the courts of this country." *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 486 (1983); *see also Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812) (Marshall, C.J.). Then, in 1952, the State Department adopted the "restrictive theory" of sovereign immunity, under which "the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)." Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Philip B. Perlman, Acting Att'y Gen., U.S. Dep't of Justice (May 19, 1952), *reprinted in* 26 Dep't St. Bull. 984, 984-85 (1952).

Application of the restrictive theory proved "troublesome," *Verlinden*, 461 U.S. at 487, and created "considerable uncertainty." H.R. Rep. No. 94-1487, at 9 (1976), *reprinted in* 1976 U.S.C.C.A.N.

6604, 6607. In some cases, the Department of State, responding to diplomatic pressure from foreign countries, filed "suggestions of immunity" made on the basis of "political considerations" that varied from one administration to the next. *See Verlinden*, 461 U.S. at 487-88; *see generally* Michael Sandler et al., *Sovereign Immunity Decisions of the Department of State: May 1952 to January 1977*, 1977 Digest app. at 1017, 1018-19. Courts would generally grant or deny immunity based on the State Department's suggestions. *See Ex parte Republic of Peru*, 318 U.S. 578, 589 (1943). In other cases, where the State Department did not express a view about immunity, courts were left to make their own determinations based on the common law and prior State Department recommendations. *Verlinden*, 461 U.S. at 487. Thus, "sovereign immunity determinations were made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations," and pursuant to "governing standards [that] were neither clear nor uniformly applied." *Id.* at 488.

Against this backdrop, Congress sought to achieve several purposes in enacting the FSIA. In transferring responsibility for determining foreign sovereign immunity exclusively to the courts, the FSIA "free[d] the Government from . . . case-by-case diplomatic pressures, . . . clarif[ied] the governing standards, and . . . 'assur[ed] litigants that decisions [would be] made on purely legal grounds and under procedures that insure due process.'" *Id.* (quoting 1976 U.S.C.C.A.N. at 6606 (alteration omitted)); *see also, e.g.*, 15 James Wm. Moore et al., *Moore's Federal Practice* § 104.3, at 104-10 (3d ed. 2009) (explaining that the FSIA's "primary goal was to

abandon the unpredictable case-by-case approach to foreign sovereign immunity in favor of a system in which decisions were to be made on purely legal grounds and under procedures that ensured due process"). The FSIA also "codif[ied] . . . international law at the time of the FSIA's enactment" (specifically "the restrictive view of sovereign immunity" expressed in the Tate letter). *Permanent Mission of India to the U.N. v. City of New York*, 551 U.S. 193, 199 (2007). And, by providing for the uniform treatment of foreign states in U.S. courts pursuant to then-prevailing international law, the FSIA sought to avoid friction with foreign countries and ensure reciprocal treatment for U.S. interests abroad. *See* Joseph W. Dellapenna, *Suing Foreign Governments and Their Corporations* 34 (2d ed. 2003) (citing, *inter alia*, 1976 U.S.C.C.A.N. at 6607-08, 6611, 6620, 6626, 6630, 6632); *see also* 1976 U.S.C.C.A.N. at 6605-06 (noting that, under the FSIA, "U.S. immunity practice would conform to the practice in virtually every other country").

This Court has interpreted the FSIA in accordance with these purposes. For example, the Court held unanimously that the FSIA provides "the *sole* basis for obtaining jurisdiction over a foreign state in [U.S.] courts." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989) (emphasis added); *see also Nelson*, 507 U.S. at 355 (same). The Court also held that "Congress intended courts to resolve *all* [sovereign immunity] claims in conformity with the principles set forth in the Act, regardless of when the underlying conduct occurred." *Altmann*, 541 U.S. at 697-98 (internal quotation marks omitted); *see also id.* at 699 (explaining that "applying the FSIA to all pending

cases regardless of when the underlying conduct occurred is most consistent with two of the Act's principal purposes: clarifying the rules that judges should apply in resolving sovereign immunity claims and eliminating political participation in the resolution of such claims").

Likewise, in further recognition of the comprehensiveness of the Act, the Court has repeatedly refused to recognize exceptions to FSIA immunity for violations of international law beyond the exceptions expressly provided by the statute. *See Amerada Hess*, 488 U.S. at 436 ("From Congress' decision to deny immunity to foreign states in the class of cases [identified in the statute], we draw the plain implication that immunity is granted in those cases involving alleged violations of international law that do not come within one of the FSIA's exceptions"). In fact, with respect to alleged violations of international law resulting from "wrongful arrest, imprisonment, and torture" by a foreign state's military and police, this Court has said that, "however monstrous such abuse" of "the power of [the] police by [a foreign] Government . . . undoubtedly may be, a foreign state's exercise of the power of its police has long been understood . . . as peculiarly sovereign in nature," and thus immunized by the FSIA. *Nelson*, 507 U.S. at 361.

B. Factual Background

1. The Petitioner, Mohamed Ali Samantar, served as Minister of Defense, First Vice President, and Prime Minister of the Democratic Republic of Somalia under Somali President Muhammad Siad Barre from 1971 through 1990. JA 38 ¶¶ 2-4. During this entire time, the United States recognized

the government of Somalia and maintained diplomatic relations with it. JA 39 ¶ 7. In fact, "[f]rom 1982 to 1988, the United States viewed Somalia as a partner in defense in the context of the Cold War. Somali officers of the National Armed Forces were trained in U.S. military schools in civilian as well as military subjects." Bureau of African Affairs, U.S. Dep't of State, *Background Note: Somalia* (Oct. 2009) [hereinafter *State Dep't Background Note*], http://www.state.gov/r/pa/ei/bgn/2863.htm.

During the 1980s, various high-ranking U.S. officials received Samantar as part of his official state visits to the United States. JA 39 ¶¶ 7-8. For example in 1983, while serving as Minister of Defense and First Vice President, Samantar met with the U.S. Vice President, Secretary of Defense, Director of the Central Intelligence Agency, and Chairman of the Joint Chiefs of Staff. JA 39 ¶ 8. In 1989, while serving as Prime Minister, he was received by the U.S. Vice President and Secretary of State. JA 39 ¶ 8.

The Barre government was overthrown early in 1991. Samantar sought temporary asylum in Kenya and then emigrated to Italy, where he lived openly from February 1991 to June 1997. Since June 1997, Samantar has resided in the United States. JA 39-40 ¶¶ 9-10.

2. After the collapse of the Barre regime, Somalia entered a period of intense civil strife. Pet. App. 33a; *see also State Dep't Background Note*. Then, in October 2004, as a result of a two-year peace process led by Kenya, Somalia's current government, the Transitional Federal Institutions (TFI), was formed.

Pet. App. 34a; *see also State Dep't Background Note.* The TFI includes the Transitional Federal Parliament (TFP), as well as the Transitional Federal Government (TFG), consisting of the President, Prime Minister, and Council of Ministers. *State Dep't Background Note.*

The United States recognizes Somalia as a state and maintains diplomatic relations with its government. Bureau of Intelligence & Research, U.S. Dep't of State, *Independent States in the World* (July 29, 2009) [hereinafter *Independent States in the World*], http://www.state.gov/s/inr/rls/4250.htm. In fact, while Somalia remains strife-ridden, the United States has repeatedly expressed support for the TFG, which it views as an ally in the fight against al-Qaeda and against piracy off the Somali coast. *See* Pet. App. 35a-36a; *see also, e.g.*, Hillary Rodham Clinton, Sec'y, U.S. Dep't of State, *Remarks With Somali Transitional Federal Government President Sheikh Sharif Sheikh Ahmed* (Aug. 6, 2009) ("The United States pledges our continued support for President Sheikh Sharif's government."), http://www.state.gov/secretary/rm/2009a/08/126956.htm; Johnnie Carson, Ass't Sec'y, Bureau of African Affairs, U.S. Dep't of State, *Briefing on Secretary Clinton's Upcoming Trip to Africa* (July 30, 2009) (discussing the importance of the TFG in fighting piracy and al-Qaeda-affiliated extremists), http://www.state.gov/p/af/rls/rm/2009/126783.htm. Somalia is also a member of the United Nations. *Independent States in the World*; *see also* Permanent Mission of the Somali Republic to the United Nations, http://www.un.int/wcm/content/site/somalia/pid/3243 (listing Somalia's representatives to the United Nations).

3. Respondents are members of the Isaaq clan and lived in Somalia during the 1980s. Pet. App. 30a. They allege various human rights violations at the hands of Somali government agents. JA 64-75. While Respondents allege grave and serious mistreatment, including torture, they "do not allege that Samantar personally committed these [alleged] atrocities or that he was directly involved." Pet. App. 5a. Instead, Respondents claim that Samantar is liable because, as Minister of Defense and Prime Minister, "he knew or should have known about this conduct and, essentially, gave tacit approval for it." Pet. App. 6a.

C. The District Court's Opinion

Respondents filed their complaint in November 2004 in the United States District Court for the Eastern District of Virginia, asserting claims under the Torture Victim Protection Act of 1991 (TVPA), 28 U.S.C. § 1350 note, and the Alien Tort Statute (ATS), *id.* § 1350. Pet. App. 43a.

The district court stayed proceedings so that the State Department could file a statement of interest regarding Samantar's entitlement to sovereign immunity as a former official of a foreign state. The court also ordered Samantar to provide monthly updates regarding the Department's position. Pet. App. 44a; JA 5-7, 14. For two years, Samantar's attorneys regularly inquired with the State Department about its position and filed monthly reports with the district court indicating that the Department had the matter "still under consideration." Pet. App. 44a; JA 7-17.

During this time, the TFG repeatedly urged the State Department to support Samantar's entitlement

to immunity, due to the potential harm that this lawsuit would have on the effort to rebuild Somalia and strengthen the TFG. In particular, TFG Minister of Foreign Affairs Abdullahi Sheikh Ismail wrote to Secretary of State Condoleezza Rice in February 2005, urging the State Department to file a statement of interest supporting Samantar's immunity because:

> The Somali reconciliation process will be made only more difficult if allegations of . . . [wrongdoing], as serious as they may be, are to be aired and debated in a forum far from the place in which those events allegedly occurred. . . . We also have concerns that the selective nature of the allegations in the lawsuit against Mr. Samantar will exacerbate the inner clan tensions that have been at the root of many of the difficulties that our country has faced and will face in the challenging process [ahead].

JA 51-52.

In February 2007, TFG Deputy Prime Minister and Acting Prime Minister Salim Alio Ibro wrote to Secretary Rice, reaffirming Samantar's entitlement to immunity and "indicat[ing] that the actions attributed to Mr. Samantar in the lawsuit in connection with the quelling of the insurgencies from 1981 to 1989 would have been taken by Mr. Samantar in his official capacit[y]" on behalf of Somalia. JA 104. He also "reemphasize[d] the potential danger to the reconciliation process in Somalia of a lawsuit that would hold a flame to past events and revive old hostilities." JA 104. TFG Prime Minister Ali Mohamed Gedi reiterated these

views in an April 2007 letter to Secretary Rice. *See* JA at 106-08.

After waiting two years with no response from the Department of State concerning its view about Samantar's entitlement to immunity, the district court reinstated the case to the active docket. Pet. App. 44a. Respondents then filed a second amended complaint, which Samantar moved to dismiss, arguing that the district court lacked subject matter jurisdiction because Samantar was entitled to immunity under the FSIA, 28 U.S.C. §§ 1602-1611. Pet. App. 44a-45a.

The district court granted Samantar's motion to dismiss. In interpreting the scope of the FSIA, the district court explained that, "'[a]lthough the statute is silent on the subject, courts have construed foreign sovereign immunity to extend to an individual acting in his official capacity on behalf of a foreign state.'" Pet. App. 47a (quoting *Velasco v. Government of Indonesia*, 370 F.3d 392, 398 (4th Cir. 2004)). Agreeing with a majority of courts of appeals, the district court held that, because "'[c]laims against the individual in his official capacity are the practical equivalent of claims against the foreign state,'" FSIA immunity applies to foreign officials as well as states themselves. Pet. App. 47a (quoting *Velasco*, 370 F.3d at 399 (citing *Chuidian v. Phil. Nat'l Bank*, 912 F.2d 1095, 1101 (9th Cir. 1990))).

The district court further compared this case to two cases that had recently been decided by other district courts and that "involv[ed] facts that closely parallel the facts of the instant action." Pet. App. 48a (citing *Belhas v. Ya'alon*, 466 F. Supp. 2d 127 (D.D.C. 2006), *aff'd*, 515 F.3d 1279 (D.C. Cir. 2008); *Matar v.*

Dichter, 500 F. Supp. 2d 284 (S.D.N.Y. 2007), *aff'd*, 563 F.3d 9 (2d Cir. 2009)). Each involved allegations of human rights violations by Israeli officials—in *Belhas*, by a former general for actions taken by the Israeli military in Lebanon, 466 F. Supp. 2d at 129, and in *Matar* by a former director of the Israeli General Security Service for bombings by military personnel in Gaza, 500 F. Supp. 2d at 286-87. Each district court held that it lacked jurisdiction because the FSIA immunized the former Israeli officials from suit for their official acts, and that neither the TVPA nor the ATS negated the immunity provided by the FSIA. Pet. App. 48a-53a.

Like the Israeli officials sued in *Belhas* and *Matar*, the district court explained, "Samantar is a retired military leader," and he "is perhaps entitled to even more deference because he was Minister of Defense, a cabinet level position, and then Prime Minister, during the alleged events." Pet. App. 53a. Furthermore, the court concluded that "[t]he allegations in the complaint clearly describe Samantar, at all relevant times, as acting upon the directives of the then-Somali government in an official capacity, and not for personal reasons or motivation." Pet. App. 61a. Indeed, like the Israeli government in *Belhas* and *Matar*, the Somali TFG sent letters to the State Department reaffirming Samantar's entitlement to immunity and stating that the alleged actions would have been taken in an official capacity on behalf of the state.[1]

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[1] While Respondents submitted two letters from representatives of the so-called Republic of Somaliland to the State Department expressing support for this lawsuit to go

Thus, because Respondents challenged alleged actions by Samantar that would (if proven) have been taken in an official capacity on behalf of a foreign state (and Respondents did not argue that any of the statutory exceptions to FSIA immunity applied, Pet. App. 47a n.12), the district court concluded that Samantar was entitled to immunity under the FSIA and dismissed the complaint for lack of subject matter jurisdiction. Pet. App. 61a-63a.

D. The Fourth Circuit's Opinion

The Fourth Circuit reversed. Pet. App. 26a. It concluded that FSIA immunity does not apply to foreign officials at all, and in any event does not apply to officials who had left office at the time that suit was filed against them. Pet. App. 20a, 25a. In so holding, the panel acknowledged that "the majority view clearly is that the FSIA applies to individual officials of a foreign state." Pet. App. 14a (citing *Chuidian*, 912 F.2d at 1099-1103; *In re Terrorist Attacks on Sept. 11, 2001* (*Fed. Ins. Co.*), 538 F.3d 71,

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(continued...)

forward, the district court declined to defer to these letters because Respondents did not "establish[] that Somaliland is an independent nation, nor that it is a foreign state recognized by the United States." Pet. App. 54a n.14. Indeed, according to the Central Intelligence Agency, the self-proclaimed Republic of Somaliland is "not recognized by *any* [foreign] government." CIA, *The World Factbook, Africa: Somalia* (Nov. 10, 2009) (emphasis added), https://www.cia.gov/library/publications/the-world-factbook/geos/so.html (background section).

The district court also "noted that the plaintiffs do not argue in the alternative that Somalia does not qualify as a 'state' for purposes of the FSIA." Pet. App. 47a n.12.

83 (2d Cir. 2008); *Keller v. Cent. Bank of Nig.*, 277 F.3d 811, 815-16 (6th Cir. 2002); *Byrd v. Corporacion Forestal y Industrial de Olancho*, 182 F.3d 380, 388-89 (5th Cir. 1999); *El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 671 (D.C. Cir. 1996)).

The panel reasoned that the statute makes "no explicit mention of individuals or natural persons, [so] it is not readily apparent that Congress intended the FSIA to apply to individuals." Pet. App. 14a. While noting that the FSIA immunizes both a "foreign state" and an "agency or instrumentality" of a state, the panel did not consider whether an individual acting in an official capacity on behalf of a foreign state constitutes a part of the foreign state itself. Rather, the panel focused exclusively on the terms "agency or instrumentality," a phrase that it found to be "laden with corporate connotations." Pet. App. 17a. "'If Congress meant to include individuals acting in [their] official capacity in the scope of the FSIA,'" the panel reasoned, "'it would have done so in clear and unmistakable terms.'" Pet. App. 18a (quoting *Enahoro v. Abubakar*, 408 F.3d 877, 881-82 (7th Cir. 2005)).

The panel majority further held that, even if the FSIA applies to individuals, it does not apply to *former* government officials like Samantar. Pet. App. 21a. The panel rested this conclusion on this Court's decision in *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003). "In *Dole Food*, the Dead Sea Companies corporation claimed immunity under the FSIA as an instrumentality of the State of Israel, which owned a majority share in parent companies of the [corporation] at the time of the events being litigated[,] but not at the time of suit." Pet. App. 21a.

Under 28 U.S.C. § 1603(b)(2), an "'agency or instrumentality of a foreign state' means any entity . . . which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest *is* owned by a foreign state or political subdivision." (emphasis added). Addressing the majority-ownership prong of § 1603(b)(2), this Court held that "the plain text of this provision, because it is expressed in the present tense, requires that [majority-ownership] status be determined at the time suit is filed." *Dole Food*, 538 U.S. at 478.

Relying on *Dole Food*, the panel concluded that an *individual's* status as an agency or instrumentality must similarly be determined at the time suit is filed. Pet. App. 22a-23a. Thus, because Samantar was no longer in office when this suit was brought, the panel reasoned that he could not be considered an "agency or instrumentality" of a foreign state.

Judge Duncan concurred in part, explaining that the panel's "conclusion that the FSIA does not apply to individuals is sufficient to resolve the case before us." Pet. App. 27a. Therefore, Judge Duncan did not join the panel "in reaching the question of whether and how [*Dole Food*] would apply to individual foreign officers." Pet. App. 27a.

In determining the applicability of the FSIA, the panel expressly declined to reach several of Respondents' arguments. It did not resolve Respondents' contention that, "even if the FSIA extends sovereign immunity to former foreign officials, the alleged acts attributed to Samantar, such as the torture and killing of civilians, are *per se* violations of universally accepted norms of

international law, which can never be within the scope of a foreign official's duties." Pet. App. 11a n.3 (internal quotation marks and citation omitted). It also did not reach Respondents' claim on appeal (which the district court noted Respondents failed to argue) that "Somalia currently does not even exist in a form that would qualify it as a 'foreign state' under the FSIA." Pet. App. 11a n.3.

In remanding the case to the district court for further proceedings, the Fourth Circuit left open the question whether Samantar "is shielded from suit by a common[-]law immunity." Pet. App. 25a-26a. It also emphasized that its decision "should not be read to intimate that [Respondents] have necessarily stated viable claims against Samantar under the ATS or TVPA; those are also open questions for remand." Pet. App. 26a.

Samantar filed a timely petition for rehearing and rehearing en banc, which the Fourth Circuit denied on February 2, 2009. Pet. App. 76a-77a. On April 23, 2009, the Chief Justice granted Petitioner's application for an extension of time to file a petition for writ of certiorari until June 18, 2009. This Court granted the petition for certiorari on September 30, 2009.

SUMMARY OF THE ARGUMENT

Congress enacted the FSIA as a comprehensive codification of the law concerning foreign sovereign immunity. The FSIA immunizes "foreign state[s]" from suit in U.S. courts, subject to certain exceptions not applicable here. 28 U.S.C. §§ 1603-1607. The statutory text, pre-FSIA common law of foreign sovereign immunity, objectives of the FSIA to promote comity and ensure reciprocal treatment of

U.S. interests abroad, and post-FSIA legislation all confirm that the term "foreign state" should be construed to include individuals acting in an official capacity on the state's behalf.

I. Petitioner—the former Minister of Defense, First Vice President, and Prime Minister of Somalia—is entitled to immunity under the FSIA for actions allegedly taken in an official capacity on behalf of a foreign state.

A. The FSIA does not comprehensively define the term "foreign state," but rather provides only that a foreign state "*includes* a political subdivision . . . or an agency or instrumentality." 28 U.S.C. § 1603(a) (emphasis added). Defining the term "foreign state" by inclusion strongly suggests that the term refers to more than just the enumerated examples. Just as the statute expressly provides that a "foreign state" includes the "agenc[ies] or instrumentalit[ies]" through which the state acts, the term "foreign state" should also be construed to include other means through which nations necessarily act, *i.e.*, individual officials acting on the state's behalf. Indeed, a suit against a present or former official for official-capacity acts is in reality a suit against the "foreign state" itself and therefore falls within the purview of the FSIA.

B. The fact that pre-1976 common law immunized a state's officials for their official acts eliminates any potential ambiguity about the scope of a "foreign state" under the FSIA. Pre-FSIA common law extended the sovereign immunity of a foreign state to its officials because an individual's official-capacity acts have long been understood to *be* acts of the state itself. Moreover, the common law drew no

distinction between present and former officials sued for official-capacity acts because an immunity based on the sovereign nature of the acts at issue does not depend on the named defendant's status at the time of suit.

This pre-FSIA common law is particularly relevant because this Court has recognized that the FSIA was intended to codify international law at the time of the statute's enactment. Indeed, laws enacted against a common-law background, like the FSIA, should be read with a presumption favoring common-law principles. That is particularly true in the context of statutes involving sovereign immunity, because derogations of sovereign immunity are strictly construed.

Construing the FSIA to exclude individual officials would broadly abrogate preexisting sovereign immunity and contravene all of these principles of construction. It would eviscerate the FSIA if plaintiffs could avoid the immunity that the FSIA expressly affords to foreign states simply by suing representatives of a foreign state for acts undertaken on the state's behalf instead of suing the state itself.

C. Construing the FSIA to exclude individual officials would also undermine the comity and reciprocal treatment of U.S. interests abroad that the FSIA was meant to ensure. Interpreting the statute not to apply to representatives of a state sued for their official acts would open the floodgates to litigation against foreign officials in U.S. courts, engendering precisely the friction with other countries that the FSIA was designed to avoid when it conformed sovereign immunity determinations in U.S. courts to those of other nations. Moreover, it

risks serious implications for U.S. officials abroad, given the overwhelming *current* international authority that provides robust immunity to officials and former officials of foreign states.

D. Post-1976 legislation confirms that the FSIA applies to foreign officials sued for acts taken on behalf of a foreign state. In 1996, Congress amended the FSIA to waive the immunity of "foreign state[s]" designated as sponsors of terrorism, and clarified that the waiver of the state's immunity extends to actions by the state's officials. In 2008, Congress further amended the FSIA to clarify that foreign states and their officials should be treated the same for purposes of the terrorism exception. These amendments to the jurisdictional immunity of a "foreign state" demonstrate Congress's understanding that acts of state officials are acts of the state itself. Moreover, the limited exception to individual immunity created by these amendments would have been entirely superfluous if individual officials were not otherwise immune from suit under the FSIA.

II. The Fourth Circuit's analysis to the contrary is flawed at every turn. *First*, in holding that an individual official is not an "agency or instrumentality" under the FSIA, the Fourth Circuit fundamentally erred by failing to recognize that the term "foreign state" itself includes the individual officials through which the state acts. Moreover, the Fourth Circuit erred even on its own terms because the phrase "agency or instrumentality" is also readily understood to include individuals through which a foreign state acts, and should be read as including

such individuals in light of the common law of foreign sovereign immunity that the FSIA codified.

Second, the Fourth Circuit also erred in holding that the FSIA does not apply to *former* officials. This Court's decision in *Dole Food* is inapposite because it dealt only with the status of an "agency or instrumentality," whereas a former official's immunity flows directly from the immunity of the "foreign state" that the official represented. In any event, *Dole Food* dealt only with the agency-or-instrumentality status of a state-owned corporation, not an individual official. The distinction is critical because a lawsuit against a foreign official for official-capacity acts necessarily attacks the acts of the foreign state itself regardless of the official's status at the time suit is filed, whereas a foreign state that has severed financial ties to a corporation as of the time of suit no longer has the same interest in that corporation's actions.

Finally, it is no answer to the Fourth Circuit's evisceration of the statute to suggest that the common law may immunize officials and former officials even if the FSIA does not. Comprehensive legislation generally supersedes and replaces the common law dealing with the same subject. This is especially true of the FSIA, which was enacted to codify the substance of the pre-1976 common law of foreign sovereign immunity while eliminating the discretionary role of the State Department in immunity determinations. A reversion to pre-FSIA common law for individual immunity determinations would reintroduce precisely the sort of diplomatic pressures and lack of uniformity that Congress

sought to eliminate by channeling all foreign sovereign immunity determinations into the FSIA.

ARGUMENT

I. SAMANTAR IS ENTITLED TO IMMUNITY UNDER THE FSIA FOR ACTIONS ALLEGEDLY TAKEN IN AN OFFICIAL CAPACITY ON BEHALF OF A FOREIGN STATE

As the overwhelming majority of courts of appeals that have considered the question have held, the FSIA should be read to extend immunity to individual officials for actions taken on behalf of a foreign state. *See Fed. Ins. Co.*, 538 F.3d 71, 85 (2d Cir. 2008); *Byrd*, 182 F.3d 380, 388 (5th Cir. 1999); *Keller*, 277 F.3d 811, 815 (6th Cir. 2002); *Chuidian*, 912 F.2d 1095, 1103 (9th Cir. 1990); *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1027 (D.C. Cir. 1997).

The court below held that officials are not immunized under the Act because, in its view, the phrase "agency or instrumentality" does not typically connote individuals. But this analysis focuses on precisely the wrong question. The FSIA merely *includes* an "agency or instrumentality" within the meaning of a "foreign state"; it does not limit a "foreign state" to those entities. The question, therefore, is whether, under an Act intended to "codif[y]. . . international law at the time of [its] enactment," *Permanent Mission of India*, 551 U.S. at 199, the immunization of foreign states encompassed immunity for officials performing the state's governmental functions. The answer is plainly yes because international law in 1976 extended the state's immunity to its officials for the obvious reason

that, since the state can only act through its officials, those officials are indistinguishable from the state itself, so stripping their immunity would substantially undermine the state's immunity.

Consequently, particularly since there is a presumption *in favor* of preserving sovereign immunity, the FSIA should be construed consistently with pre-1976 common law, rather than as departing from it *sub silentio*. This is especially true because denying immunity to former and present government officials would also depart from the current treatment given such officials by foreign nations under international law, and thus would defeat the reciprocity that is both an important general value under foreign immunity law and one of the avowed purposes of the FSIA itself. Finally, post-1976 congressional enactments vividly confirm that the FSIA was intended to cover individual state officials.

A. The Term "Foreign State" Should Be Construed To Include Officials Acting On The State's Behalf

The FSIA provides that "a foreign state shall be immune from the jurisdiction" of U.S. courts. 28 U.S.C. § 1604. While the statute does not expressly mention individuals, neither does it define the term "foreign state." Rather, the Act provides only that a foreign state "*includes* a political subdivision of a foreign state or an agency or instrumentality of a foreign state." *Id.* § 1603(a) (emphasis added). The question, therefore, is whether the inclusive term "foreign state" encompasses the individuals through which the state acts.

In this context, the term "includes" is "not one of all-embracing definition, but connotes simply an

illustrative application of the general principle." *Fed. Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 99-100 (1941); *see also, e.g.*, 2A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutory Construction* § 47:7, at text accompanying n.18 (7th ed. 2007) (explaining that "the word 'includes' is usually a term of enlargement, and not of limitation," and, "therefore, conveys the conclusion that there are other items includable, though not specifically enumerated") (internal quotation marks omitted). Defining the term "foreign state" by inclusion and illustration therefore strongly suggests that the term refers to more than just the identified examples.

Consequently, even assuming that the phrase "agency or instrumentality" does not encompass natural persons, *but see infra* at 45-47, the statute's illustrative inclusion of an "agency" as a "foreign state" *supports* the conclusion that a "foreign state" similarly includes its "agents." Since "foreign state" does not mean the state *qua* state, but also "agencies or instrumentalities" through which the state acts, the term "foreign state" should also be construed to include other means through which nations necessarily act, *i.e.*, the individual officials and former officials who acted on behalf of the state. *Cf. Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 153 (D.C. Cir. 1994) (explaining that "[a]ny government of reasonable complexity must act through men organized into offices and departments" and "hold[ing] that armed forces are as a rule so closely bound up with the structure of the state that they" constitute part of "the 'foreign state' itself" within the meaning of the FSIA); *Ministry of Def. & Support for the Armed Forces of the Islamic Rep. of Iran (MOD) v. Cubic Def. Sys., Inc.*, 495 F.3d 1024,

1035 (9th Cir. 2007) (finding that a defense ministry constitutes a "foreign state" under the FSIA and noting that a "foreign state is nothing more than the sum of its parts [and] . . . exists only through its head of state" and other officials, "its ministries, and the myriad administrative offices that collectively embody a sovereign state"), *rev'd on other grounds sub nom. MOD v. Elahi*, 129 S. Ct. 1732 (2009).

Indeed, acts taken by state officials on behalf of a state have long been understood to *be* acts of the state. *See, e.g., Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 303 (1918) (concluding that the action of a "duly commissioned military commander" of the Mexican government "[p]lainly . . . was the action, in Mexico, of the legitimate Mexican government"); *Underhill v. Hernandez*, 65 F. 577, 579 (2d Cir. 1895) ("[T]he acts of the official representatives of the state are those of the state itself, when exercised within the scope of their delegated powers . . . ."), *aff'd*, 168 U.S. 250 (1897). Thus, the term "foreign state" is readily construed to include officials acting on the state's behalf. A suit against a present or former official for actions undertaken on behalf of the state is in reality a suit against the "foreign state" itself, and therefore falls within the purview of the FSIA.

B. The FSIA Should Be Construed Consistently With The Common Law Of Foreign Sovereign Immunity That It Codified

The fact that pre-1976 common law immunized the state's officials for their official acts, just as it did the state itself and its agencies, eliminates any potential ambiguity about the scope of a "foreign state" under the FSIA.

1. As this Court recognized in *Permanent Mission of India*, because the FSIA was intended to "codif[y] . . . international law at the time of the FSIA's enactment," pre-1976 "international practice" is particularly relevant to interpreting the scope of the Act. 551 U.S. at 199-200 (relying on the Restatement (Second) of Foreign Relations Law of the United States (1965) to determine the scope of foreign sovereign immunity under the FSIA); *see generally* 2B *Sutherland Statutory Construction* § 50:2, at text accompanying n.5 (7th ed. 2008) (explaining that the common law is "especially important . . . in determining legislative intent" when the statute purports to codify or restate the common law); S. Rep. No. 94-1310, at 9 (1976) ("[T]he [FSIA] would codify the so-called 'restrictive' principle of sovereign immunity, as presently recognized in international law."); 1976 U.S.C.C.A.N. at 6605 (same).

Permanent Mission of India reflects the settled precept that statutes enacted against a common-law backdrop, such as the FSIA, should "be read with a presumption favoring the retention of long-established and familiar [common-law] principles, except when a statutory purpose to the contrary is evident." *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952); *see also United States v. Texas*, 507 U.S. 529, 534 (1993) (explaining that a statute should not be read "to abrogate a common-law principle" unless it "speak[s] directly to the question addressed by the common law") (internal quotation marks omitted).

This presumption favoring retention of the common law is particularly necessary in the context of legislation addressing sovereign immunity because

statutes derogating sovereign immunity are strictly construed. *See Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999) (explaining that this Court has "frequently held . . . that a waiver of sovereign immunity is to be strictly construed, in terms of its scope, in favor of the sovereign"); 3 *Sutherland Statutory Construction* § 62:1 (7th ed. 2008) ("Even where the government is expressly included in a statute, the statute is kept within the narrowest possible limits to preserve sovereignty."). And it is all the more important in the context of preserving *foreign* sovereign immunity, which "promotes the comity interests that" are vital to harmonious relations among nations. *Republic of Philippines v. Pimentel*, 128 S. Ct. 2180, 2190 (2008); *see also Nat'l City Bank of N.Y. v. Republic of China*, 348 U.S. 356, 362 & n.7 (1955) (foreign sovereign immunity derives from "standards of public morality, fair dealing, reciprocal self-interest, and respect for the 'power and dignity' of the foreign sovereign") (quoting *Schooner Exch.*, 7 Cranch at 136-37, 143-44).

2. Here, the common law accorded immunity to state officials for acts undertaken on behalf of the state, so any statutory silence or ambiguity should not be read to abrogate that immunity.

a. Under pre-FSIA common law, acts taken by a state official on behalf of a state were long understood to *be* acts of the state, and a suit against a state officer for his official acts was therefore treated as the equivalent of a suit against the state. *See Underhill*, 65 F. at 579 ("[B]ecause the acts of the official representatives of the state are those of the state itself, when exercised within the scope of their delegated powers, courts and publicists have

recognized the immunity of public agents from suits brought in foreign tribunals for acts done within their own states in the exercise of the sovereignty thereof."). Thus, before enactment of the FSIA, courts routinely held that officials acting in their official capacities were entitled to immunity derived from that of the state itself. *See, e.g.*, *Heaney v. Government of Spain*, 445 F.2d 501, 504 (2d Cir. 1971) (explaining that "the immunity of a foreign state" *itself* "extend[ed] to any . . . official or agent of the state with respect to acts performed in his official capacity") (internal quotation marks omitted); *Bradford v. Dir. Gen. of R.R.s of Mex.*, 278 S.W. 251, 251-52 (Tex. Civ. App. 1925); *see also Greenspan v. Crosbie*, No. 74 Civ. 4734 (GLG), 1976 WL 841 (S.D.N.Y. Nov. 23, 1976); *Oliner v. Can. Pac. Ry. Co.*, 311 N.Y.S.2d 429 (N.Y. App. Div. 1970) (dismissing suit because a government official who is entitled to sovereign immunity was an indispensable party); 1 Op. Att'y Gen. 81 (1797), 1797 WL 427 ("[I]t is . . . well settled . . . that a person acting under a commission from the sovereign of a foreign nation is not amenable for what he does in pursuance of his commission, to any judiciary tribunal in the United States.").[2]

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[2] Recent cases also confirm this understanding that "pre-1976 common law expressly extended immunity to individual officials acting in their official capacity." *Chuidian*, 912 F.2d at 1101; *see also Matar*, 563 F.3d at 14 ("At the time the FSIA was enacted, the common law of foreign sovereign immunity recognized an individual official's entitlement to immunity for acts performed in his official capacity" (internal quotation marks omitted)); *Fed. Ins. Co.*, 538 F.3d at 83 ("Prior to the FSIA's passage, [common law] principles expressly extended immunity to individual officials acting in their official

The Restatement (Second) of Foreign Relations Law, on which this Court relied to interpret the FSIA in *Permanent Mission of India*, 551 U.S. at 200, similarly explained that under the common law, a foreign state's sovereign immunity extended to a "minister, official, or agent of the state with respect to acts performed in his official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state." Restatement (Second) of Foreign Relations Law of the United States § 66(f) (1965).

Courts outside the United States interpreting pre-1976 international common law reached similar conclusions. These courts recognized that individuals acting in their official capacities were immune from suit for actions taken on behalf of the state. *See, e.g.*, *Grunfeld v. United States* (N.S.W. Sup. Ct. 1968) (Australia) (explaining "[i]t is well settled that an entitlement to sovereign immunity is not limited to the foreign sovereign himself" and holding that officers "acting as agents of the United States" were entitled to immunity), *reprinted in* 20 *U.N. Legislative Series, Materials on Jurisdictional Immunities of States and Their Property*, at 181-83, U.N. Doc. ST/LEG/SER.B/20, U.N. Sales No. E/F.81.V.10 (William S. Hein & Co., photo. reprint 2003) (1982) [hereinafter *Materials on Jurisdictional*

(continued...)

capacity.") (internal quotation marks omitted); *Belhas*, 515 F.3d at 1285 ("In 1976, it was well settled that sovereign immunity existed for any . . . official . . . with respect to acts performed in his official capacity" (internal quotation marks omitted)).

Immunities]; *Syquia v. Almeda Lopez* (Phil. Sup. Ct. 1949) (holding that "under the well settled rule of International law," U.S. military officers acting "pursuant to orders received from the Government" were entitled to immunity), *reprinted in Materials on Jurisdictional Immunities* at 360, 363; *see also Rahimtoola v. Nizam of Hyderabad*, [1958] A.C. 379, 402 (H.L. 1957) (appeal taken from C.A.) (U.K.) (Lord Reid) (explaining official is entitled to sovereign immunity because "the State is entitled to object to its agent being made a party: the agent would merely be defending the action on behalf of his principal"). *See generally* Sompong Sucharitkul, *Immunities of Foreign States Before National Authorities*, 149 Recueil Des Cours 87, 100 (1977) (collecting 1976 courses of the Hague Academy of International Law) ("By general definition, a State acts through its organs or agencies, which normally include the persons . . . which constitutionally form organic parts of the machinery of the central government of a sovereign State. Such agencies being part and parcel of the State are generally accorded the same immunity as the State they represent.") (footnote omitted).

From the adoption of the restrictive theory of sovereign immunity in 1952 to the effective date of the FSIA, the State Department issued suggestions of immunity for individual officials sued for acts taken on behalf of a foreign state. *See* Sandler et al., *supra* (appendix to 1977 Digest, describing all State Department immunity decisions from 1952 through 1977) [*hereinafter Appendix*]; *Greenspan v. Crosbie* (S.D.N.Y.; suggestion 1976), *Appendix* at 1076-77 (suggesting immunity for foreign officials); *Semonian v. Crosbie* (D. Mass.; suggestion 1976), *Appendix* at

1075-76 (same); *Waltier v. Thomson* (S.D.N.Y.; suggestion 1960), *Appendix* at 1037 (suggesting sovereign immunity for "acts done by Mr. Thomson in the course of, or in connection with, his official duties"); *cf. Cole v. Heidtman* (S.D.N.Y.; suggestion declined 1968), *Appendix* at 1062-63 (concluding British West Indies Central Labour Organization and its liaison officer were not entitled to immunity under the Tate Letter because the lawsuit involved private, commercial activities).

This immunity was also available where individuals were alleged to have acted "'in excess of their authority,'" so long as they acted "'in their official capacities and on behalf of the [State].'" *Appendix* at 1076 (quoting State Department letter suggesting immunity in *Greenspan*); *see also Greenspan*, 1976 WL 841, at *2 (adopting suggestion of immunity and dismissing lawsuit). As the Second Circuit explained in *Heaney v. Government of Spain*, 445 F.2d at 504, "to condition a foreign sovereign's immunity on the outcome of a preliminary judicial evaluation of the propriety of its political conduct, with the attendant risks of embarrassment at the highest diplomatic levels, would frustrate the very purpose of the doctrine itself." *See also id.* at 504-05 (holding, in the alternative, that the official was also entitled to consular immunity).

b. Under pre-1976 common law, it was also well settled that sovereign immunity extended to *former* officials for actions that they took on behalf of a state while in office. *See Underhill*, 65 F. at 583 (holding that a former military officer was entitled to sovereign immunity for actions taken while in office on behalf of Venezuela); *see also Matar*, 563 F.3d at

14 (analyzing pre-1976 common law); *Belhas*, 515 F.3d at 1285 (same).

Former officials were entitled to this immunity because "[a]n immunity based on acts—rather than status—does not depend on tenure in office." *Matar*, 563 F.3d at 14; *see also Belhas*, 515 F.3d at 1285 ("The common law of foreign sovereign immunity made no distinction between the time of the commission of official acts and the time of suit."). Under international common law, individual immunity for official acts exists because "[a]ctions against . . . [State] agents . . . are essentially proceedings against the State they represent." U.N. Int'l Law Comm'n, *Draft Articles on Jurisdictional Immunities of States and Their Property, with Commentaries* 18 (1991) [hereinafter *Draft Articles on Jurisdictional Immunities*]. Consistent with this rationale, these act-based immunities "are not in any way affected by the change or termination of the official functions of the representatives concerned. . . . because the immunity in question not only belongs to the State, *but is also based on the sovereign nature or official character of the activities*." *Id.* (emphasis added); *see also* Hazel Fox, *The Law of State Immunity* 666 (2d ed. 2008) (contrasting act-based immunities with status-based immunities); Sucharitkul, *supra*, at 98-99 (same).

For these reasons, courts outside the United States interpreting pre-1976 international law also recognized that an individual's entitlement to sovereign immunity and similar act-based immunities depended on the official nature of the act in question, not on the current status of the individual who allegedly committed the act. *See*

Johnson v. Turner (Phil. Sup. Ct. 1954) (holding U.S. military officers who had "long left the Philippines" were entitled to sovereign immunity for actions taken "in their official capacities"), *in Materials on Jurisdictional Immunities* at 368-70; *Rahimtoola*, [1958] A.C. at 393-94 (Viscount Simonds) (holding former High Commissioner of Pakistan was entitled to sovereign immunity for actions taken as "the agent of a Sovereign State"); *cf. Zoernsch v. Waldock*, [1964] 2 All E.R. 256 (C.A.) (U.K.) (holding former president of the European Commission of Human Rights was entitled to diplomatic immunity for actions taken in his official capacity). *See generally* Sucharitkul, *supra*, at 99 ("While the immunities *ratione materiae*, on account of the public or official character of the acts, will continue to subsist since they belong ultimately to the States, the immunities *ratione personae* will succumb with the termination of the public offices.").[3]

4. In sum, it is hardly surprising that international law in 1976 treated state officials as the state for immunity purposes. It simply reflects the obvious reality that state officials are functionally indistinguishable from the state for their official acts because the "state" can only act through its officers.

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[3] Similarly, courts held that the closely related act of state doctrine shielded both current and former officials from suit. *See Underhill*, 168 U.S. at 252-54 (affirming Second Circuit's decision on the basis of the act of state doctrine); *Hatch v. Baez*, 14 N.Y. Sup. Ct. 596, 600 (1876) ("The fact that the defendant has ceased to be president of St. Domingo does not destroy his immunity [under the act of state doctrine]. That [immunity] springs from the capacity in which the acts were done, and protects the individual who did them . . . .").

Consequently, stripping the officers' immunity is inconsistent with, and undermines, the purpose of immunizing the sovereign.

The term "foreign state" in the FSIA should be interpreted in light of this settled pre-FSIA understanding that the immunity of a state extends to officials acting on the state's behalf, because the official-capacity acts of state officials *are* the acts of the state itself. Construing the FSIA to preclude immunity for officials and ex-officials would broadly abrogate that preexisting sovereign immunity. Indeed, it would "defeat the purpose[]" of the FSIA as a "comprehensive codification of immunity and its exceptions" if plaintiffs "could avoid [the] immunity" that the FSIA accords to foreign states "simply by recasting the form of their pleadings" and suing state officials for their official acts instead of suing the foreign state itself. *Chuidian*, 912 F.2d at 1102; *cf. Chi. & Nw. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 324 (1981) ("[C]ompliance with the intent of Congress cannot be avoided by mere artful pleading."); *Block v. North Dakota*, 461 U.S. 273, 284-85 (1983) (explaining that North Dakota cannot "avoid the [Quiet Title Act's] statute of limitations and other restrictions [on suits against the United States] by the device of an officer's suit," and that "'[i]t would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by [such] artful pleading'").

Such a result would undermine the FSIA's objective of codifying pre-1976 international law, *see Permanent Mission of India*, 551 U.S. at 199, and would contravene venerable canons of construction—

namely, the "presumption favoring the retention of long-established and familiar [common-law] principles" absent statutory language or "purpose to the contrary," *Isbrandtsen*, 343 U.S. at 783; and the precept that "waiver[s] of sovereign immunity [are] to be strictly construed," *Blue Fox*, 525 U.S. at 261, particularly in the context of *foreign* sovereign immunity, which is designed to promote comity among nations, *see Schooner Exch.*, 7 Cranch at 136-37, 143-44.

C. Interpreting The FSIA To Exclude Individual Officials Would Undermine The Comity And Reciprocity That The FSIA Was Meant To Ensure

Construing the FSIA to exclude individual officials would also undermine the comity and reciprocal treatment of U.S. interests abroad that Congress meant to ensure when it codified the law governing foreign sovereign immunity in the FSIA. *See, e.g.*, *Altmann*, 541 U.S. at 696.

First, construing the FSIA to exclude claims against state officials for official-capacity acts would open the floodgates to litigation against foreign officials in U.S. courts. That would "place an enormous strain not only upon our courts but, more to the immediate point, upon our country's diplomatic relations with any number of foreign nations," including strong U.S. allies whose officials have already been targeted in U.S. courts. *Belhas*, 515 F.3d at 1287 (internal quotation marks omitted); *see also, e.g.*, *Matar*, 563 F.3d at 10 (suit against former Israeli official); *Fed. Ins. Co.*, 538 F.3d at 75 (suit against Saudi officials); *Blaxland v. Commonwealth Dir. of Pub. Prosecutions*, 323 F.3d 1198 (9th Cir.

2003) (suit against Australian officials); *El-Fadl*, 75 F.3d 668 (suit against Jordanian officials); *Kato v. Ishihara*, 239 F. Supp. 2d 359 (S.D.N.Y. 2002) (suit against Japanese official); *Greenpeace, Inc. (U.S.A.) v. State of France*, 946 F. Supp. 773 (C.D. Cal. 1996) (suit against French officials); *Bryks v. Can. Broad. Corp.*, 906 F. Supp. 204 (S.D.N.Y. 1995) (suit against Canadian officials).

Foreign sovereign immunity rests on the premise that disputes among nations over official state action should be resolved through diplomacy, among other means, rather than through private civil litigation in foreign courts. *See, e.g.*, Fox, *supra*, at 64. The resulting "[s]trains in international relationships" engendered by permitting such suits against officials of foreign states in U.S. courts may "incrementally reduce US national security" and "undermine a variety of cooperative ventures, ranging from trade, to environmental protection, to the war on drugs, to arms control, to combating terrorism," to the fight against piracy. Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 Chi. J. Int'l L. 457, 460 (2001). The FSIA was designed to avoid precisely such friction with other countries by conforming sovereign immunity determinations in U.S. courts to those of other nations. *See* 1976 U.S.C.C.A.N. at 6634; *see also supra* at 3-6.

Second, reading the FSIA to exclude foreign officials, and thereby undermining the protection that U.S. law affords foreign countries from suit in U.S. courts, risks serious reciprocal implications for U.S. officials abroad. International law, both at the time of the FSIA's enactment and now, provides robust protection to officials and former officials from

civil suits for their official actions. *See infra* at 36-38. By codifying those protections and "conform[ing]" "U.S. immunity practice . . . to the practice in virtually every other country," Congress sought to ensure reciprocal treatment for U.S. interests in the courts of other countries. *See* 1976 U.S.C.C.A.N. at 6605-06; *see also* Dellapenna, *supra*, at 34; *cf. Hilton v. Guyot*, 159 U.S. 113, 228 (1895) ("[I]nternational law is founded upon mutuality and reciprocity . . . ."); *Boos v. Barry*, 485 U.S. 312, 323 (1988) ("[I]n light of the concept of reciprocity that governs much of international law in this area, we have a more parochial reason to protect foreign diplomats in this country. Doing so ensures that similar protections will be accorded those that we send abroad to represent the United States . . . .") (citation omitted).

That reciprocity would be jeopardized if U.S. courts did not grant foreign officials the immunity that modern international law requires. Now, as in 1976, courts around the world recognize that officials are entitled to sovereign immunity in civil suits challenging their official-capacity acts. *See Jones v. Ministry of Interior of Saudi Arabia*, [2007] 1 A.C. 270, 281 (H.L. 2006) (appeal taken from C.A.) (U.K.) (Lord Bingham) (citing domestic and international authorities establishing consensus that a "foreign state's right to immunity cannot be circumvented by suing its servants or agents"); *Holland v. Lampen-Wolfe*, [2000] 1 W.L.R. 1573, 1583 (H.L.) (appeal taken from C.A.) (U.K.) (Lord Millett) ("Where the immunity applies [under customary international law], it covers an official of the state in respect of acts performed by him in an official capacity."); *Jaffe v. Miller*, [1993] 13 O.R.3d 745, 758-59 (C.A.) (concluding under both common law and Canada's

State Immunity Act that the official was entitled to sovereign immunity because "confer[ring] immunity on a government department of a foreign state but . . . deny[ing] immunity to the functionaries, who in the course of their duties performed the acts, would render [sovereign immunity] ineffective"); *Church of Scientology Case*, 65 I.L.R. 193, 198 (Fed. Sup. Ct. 1978) (Germany) ("Any attempt to subject State conduct to German jurisdiction by targeting the foreign agent performing the act would undermine the absolute immunity of sovereign States in respect of sovereign activity."); *see also* Fox, *supra*, at 455-56 ("State immunity is extended to a person who performs an act on behalf of the State to prevent proceedings which indirectly implead the foreign State, where the State would have enjoyed immunity had the proceedings been brought against it.").

Recent non-judicial international authorities confirm that individuals acting in their official capacities are entitled to immunity for their official acts. For example, the Convention on Jurisdictional Immunities of States and Their Property, which the United Nations General Assembly adopted on December 2, 2004, recognizes that the "State," for immunity purposes, includes "representatives of the State acting in that capacity." Article 2(1)(b)(iv). As the International Law Commission's Commentaries further explain, "It is to be observed that, in actual practice, proceedings may be instituted, not only against the government departments or offices concerned, but also against their directors or permanent representatives in their official capacities. Actions against such representatives or agents of a foreign Government in respect of their official acts are essentially proceedings against the State they

represent. The foreign State, acting through its representatives, is immune *ratione materiae*." *Draft Articles on Jurisdictional Immunities*, Article 2 Commentary, ¶ 18 (footnote omitted); *cf.* U.N. Int'l Law Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, Article 4 (2001) ("The conduct of any State organ shall be considered an act of that State under international law . . . . An organ *includes any person or entity* which has that status in accordance with the internal law of the State.") (emphasis added).

These authorities similarly recognize that former officials are entitled to sovereign immunity for their official acts. *See, e.g.*, Fox, *supra*, at 461 (discussing former officials' entitlement to sovereign immunity under U.N. Convention); *Draft Articles on Jurisdictional Immunities*, Article 2 Commentary, ¶ 18 ("Such immunities characterized as *ratione materiae* are accorded for the benefit of the State and are not in any way affected by the change or termination of the official functions of the representatives concerned. Thus, no action will be successfully brought against a former representative of a foreign State in respect of an act performed by him in his official capacity."); *cf.* Restatement (Third) of Foreign Relations Law of the United States § 464, at 471 (1987) (Reporters' Notes) ("Former heads of state or government have sometimes sought immunity from suit in respect of claims arising out of their official acts while in office. Ordinarily, such acts are not within the jurisdiction to prescribe of other states.").

If U.S. courts decline to accord officials and former officials of foreign states the immunity that

international law requires, U.S. officials may be at heightened risk of reciprocal actions abroad. *See* Bradley, 2 Chi. J. Int'l L. at 461 (describing the risk of such retaliation and giving an example of an Iranian law that allows lawsuits against the United States in Iranian courts and that was enacted "as a 'measure of reciprocity' in response to . . . suits allowed in US Courts against Iran") (citing *Tehran to Set Up Special Court for Lawsuits Against the U.S.*, Agence France Presse, Nov. 15. 2000; *Iran MPs Cry 'Down with America,' Approve Lawsuits Against United States*, Agence France Presse, Nov. 1, 2000); Jennifer K. Elsea, *CRS Report for Congress: Suits Against Terrorist States by Victims of Terrorism* 66 (2008) (explaining that "Cuba reportedly allows . . . suits [against the United States] for violations of human rights," in response to suits permitted against Cuba in U.S. courts, and that "at least two judgments assessing billions of dollars in damages against the U.S. have apparently been handed down" by Cuban courts).

Such a risk would come at a time in which actions taken by the United States abroad have been controversial, even among U.S. allies, and in which current and former U.S. officials have already been targeted in foreign courts seeking to hold them liable for acts undertaken in their official capacities. Indeed, in the criminal context, numerous suits have already been filed against U.S. officials in France, Germany, Belgium, Spain, and Italy, alleging violations of international law in relation to the wars in Iraq and Afghanistan and other U.S. intelligence and military operations. *See, e.g.*, Manuela D'Alessandro & Daniel Flynn, *Italy Convicts Former CIA Agents in Rendition Trial*, Reuters, Nov. 4, 2009,

http://www.reuters.com/article/topNews/idUSTRE5A33QB20091104; *Legal Fight Against Rumsfeld Heads to Spain*, Spiegel Online Int'l, Apr. 30, 2007, http://www.spiegel.de/international/europe/0,1518,480215,00.html; *US Attacks Belgium War Crimes Law*, BBC News, June 12, 2003, http://news.bbc.co.uk/2/hi/europe/2985744.stm; French War Crimes Complaint Against Donald Rumsfeld, Ctr. for Constitutional Rights, http://ccrjustice.org/ourcases/current-cases/french-war-crimes-complaint-against-donald-rumsfeld; German War Crimes Complaint Against Donald Rumsfeld, Ctr. for Constitutional Rights, http://ccrjustice.org/ourcases/current-cases/german-war-crimes-complaint-against-donald-rumsfeld%2C-et-al. Undoubtedly, similar politically motivated civil suits will be filed against U.S. officials if the United States weakened the immunity accorded in our courts to foreign officials.

Moreover, to the extent there is ambiguity about whether the FSIA extends immunity to individual officials, that ambiguity should be resolved in light of the *Charming Betsy* canon, which requires courts to construe federal statutes, wherever possible, not to violate international law. *See Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *see generally* Curtis A. Bradley et al., Sosa, *Customary International Law, and the Continuing Relevance of* Erie, 120 Harv. L. Rev. 869, 921 (2007) (citing authorities and explaining that the *Charming Betsy* canon supports the use of international law as "a relevant consideration in discerning Congress's intent"). Indeed, "[i]n the absence of any relevant exception, the United States would violate [present] international law if it failed to confer immunity on

state officials for their official acts committed while in office." Curtis A. Bradley & Jack L. Goldsmith, *Foreign Sovereign Immunity, Individual Officials, and Human Rights Litigation*, 13 Green Bag 2d 9, 16 (2009). Thus, the FSIA should be interpreted consistently with the statute's purposes and with the overwhelming authority holding that international law immunizes foreign officials for official-capacity acts.

D. Post-1976 Legislation Confirms That The FSIA Applies To Individuals Acting In An Official Capacity On Behalf Of A Foreign State

Post-1976 amendments to the FSIA confirm that Congress understood individual officials of the foreign state, when they undertake their official duties, to be part of the "foreign state" itself, and thus within the purview of the FSIA.

In 1996, Congress amended the FSIA to waive the immunity of certain "foreign state[s]" designated as state sponsors of terrorism, for claims of "torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act," 28 U.S.C. § 1605(a)(7) (repealed 2008; pertinent language recodified at *id.* § 1605A(a)(1)), and also created a private right of action for such conduct, *id.* § 1605 note (amended language codified in 2008 at *id.* § 1605A(c)).

Congress expressly provided that this waiver of the "jurisdictional immunity *of a foreign state*," *id.* § 1605 (pertinent language also codified in 2008 at *id.* § 1605A) (emphasis added), also encompasses acts by officials, employees, and agents undertaken on behalf of the state, thus demonstrating its understanding

that individual agents of a foreign state, when they perform their official duties, *are* the "foreign state" for purposes of the FSIA. *Id.* § 1605(a)(7) (repealed 2008; pertinent language recodified at *id.* § 1605A(a)(1)) (abrogating preexisting immunity in connection with, *inter alia*, the "provision of material support or resources . . . *by an official, employee, or agent* of [a] foreign state while acting within the scope of his or her office, employment, or agency") (emphasis added); *id.* § 1605 note (creating private right of action against any "*official, employee, or agent* of a foreign state designated as a state sponsor of terrorism . . . while acting within the scope of his or her office, employment, or agency") (emphasis added). In 2008, Congress further amended the FSIA to clarify that foreign states and their officials should be treated the same for purposes of the terrorism exception. *See id.* § 1605A(c).

Moreover, the reference by these amendments to officials, employees, and agents underscores that the FSIA applies to individuals because, "[i]f these individuals were not otherwise immune from suit pursuant to the FSIA, these provisions" creating an exception to individual immunity in limited circumstances "would be entirely superfluous." *Fed. Ins. Co.*, 538 F.3d at 84. As the Second Circuit explained, "[i]ndividuals and government officers . . . cannot be designated [directly as] 'state sponsor[s] of terrorism.'" *Id.* "So that such individuals would nevertheless fall within the scope of the Terrorism Exception to FSIA immunity, Congress enacted specific provisions that defined the exception to reach these individuals." *Id.* The creation of that exception suggests "that Congress considered individuals and government officers [otherwise] to be within the

scope of the FSIA." *Id.*; *cf. Alden v. Maine*, 527 U.S. 706, 724 (1999) ("The handful of state statutory and constitutional provisions authorizing suits or petitions of right against States only confirms the prevalence of the traditional understanding that a State could not be sued in the absence of an express waiver, for if the understanding were otherwise, the provisions would have been unnecessary.").

E. These Principles Establish That Samantar Is Entitled To Immunity Under The FSIA For His Official-Capacity Acts

For the reasons described above, the FSIA applies to individual officials sued for acts undertaken in an official capacity on behalf of a "foreign state." 28 U.S.C. § 1604. That construction of the statute comports with the statutory text because the acts of an official representative of a state, when taken on behalf of the state, have long been understood to be the acts of the state itself. Thus, a suit against an individual for official-capacity acts is in reality a suit against the state. This understanding also best implements the key purposes of the FSIA, which would be circumvented if plaintiffs could plead around Congress's comprehensive codification of foreign sovereign immunity law by suing the individuals through which a state acts instead of the state itself. And it follows the customary international law of state immunity, which the FSIA codified and which advances comity among nations by recognizing broad immunity for individuals sued over official-capacity acts.

Moreover, because an individual's entitlement to sovereign immunity for official acts flows from the sovereign nature of those acts, and not from the

individual's status at the time of suit, a lawsuit against a former official for official-capacity acts is just as readily understood as a lawsuit against the "foreign state." 28 U.S.C. § 1604. Indeed, "[t]o allow the resignation of an official . . . to repeal his immunity" for official-capacity acts "would destroy . . . [international] comity" and effectively nullify the sovereign immunity of the state. *Belhas*, 515 F.3d at 1286. The FSIA therefore applies to suits against former officials of a foreign state for their official-capacity acts.

These principles establish that Samantar is entitled to immunity under the FSIA. As the district court correctly found, "[t]here is . . . no doubt that Samantar is being sued in his capacity as a former Minister of Defense and Prime Minister." Pet. App. 53a. The complaint expressly sued Samantar for actions allegedly taken in these official roles. JA 55-102 (*see* ¶¶ 2, 5-7, 95, 104, 114, 124, 134, 143, 152).

Indeed, "the Somali Transitional Federal Government, which is supported and recognized by the United States as the governing body in Somalia," Pet. App. 54a, has repeatedly reaffirmed in letters to the Department of State that the actions alleged in the complaint, "as serious as they may be," "would have been taken by Mr. Samantar in his official capacit[y]" on behalf of Somalia, and that allowing this lawsuit to proceed in U.S. courts would "exacerbate . . . tensions" in Somalia and threaten "the reconciliation process" in that country. JA 51-52, 104.

Thus, while the complaint is captioned as an action against Samantar, its allegations are directed at purported acts that would have been undertaken

in an official capacity on behalf of a foreign state. Under the FSIA, a U.S. court has no jurisdiction over such an action, just as it would have no jurisdiction over an action filed directly against Somalia. 28 U.S.C. § 1604.

II. THE FOURTH CIRCUIT'S ERRONEOUS HOLDINGS TO THE CONTRARY DO NOT WITHSTAND SCRUTINY

Each of the Fourth Circuit's contrary holdings—that the FSIA does not apply to individual officials at all, and that in any event it does not apply to former officials—is incorrect.

A. The Fourth Circuit Erred In Holding That The FSIA Does Not Apply To Individuals

The Fourth Circuit's conclusion that FSIA immunity does not apply to individuals is flawed at every turn.

First, as noted, the Fourth Circuit fundamentally erred by failing to recognize that an "agency or instrumentality" does not exhaust what constitutes a "foreign state" under the FSIA, and that a "foreign state" includes the individual officials through which the state acts.

Second, and in any event, the Fourth Circuit was wrong even on its own terms, because the phrase "agency or instrumentality" also encompasses foreign officials acting in their official capacities. As numerous circuits have held, an "agency or instrumentality" of a foreign state encompasses "any thing or person through which action is accomplished," including individual officers of the state. *Fed. Ins. Co.*, 538 F.3d at 83; *see also Keller*, 277 F.3d at 815-16; *Byrd*, 182 F.3d at 388-89; *El-*

Fadl, 75 F.3d at 671. To be sure, § 1603(b)'s definition of "agency or instrumentality" "may not explicitly include individuals." *Chuidian*, 912 F.2d at 1101. But "neither does it expressly exclude them." *Id.* "The terms 'agency,' 'instrumentality,' 'organ,' 'entity,' and 'legal person,' while perhaps more readily connoting an organization or collective, do not in their typical legal usage necessarily exclude individuals." *Id.*; *cf. United States v. Ambert*, 561 F.3d 1202, 1211 (11th Cir. 2009) (explaining that "[*i*]*nstrumentalities* of interstate commerce . . . are the people and things themselves moving in commerce") (emphasis added and internal quotation marks omitted); 11 U.S.C. § 101(12A) (defining a "debt relief *agency*" as "any *person* who provides any bankruptcy assistance . . . in return for the payment of money") (emphasis added).

Moreover, although the language of § 1603(b)(3) refers only to corporate entities, this prong of the statutory definition of an "agency or instrumentality" merely prescribes what *is not* an agency or instrumentality for FSIA purposes. That a particular type of corporate entity is *excluded* from the definition of an agency or instrumentality, *see* 28 U.S.C. § 1603(b)(3), says nothing about whether an individual acting in an official capacity is likewise excluded. If anything, in light of the long tradition of extending foreign sovereign immunity to individual officials acting on behalf of foreign states, Congress's decision not to exclude individuals from the definition of an agency or instrumentality suggests that individuals come within the purview of the statute. *See Chuidian*, 912 F.2d at 1101 (concluding that the phrase "agency or instrumentality" includes individual officials because "[n]owhere in the text or

legislative history does Congress state that individuals are *not* encompassed within the section 1603(b) definition"); *see also Fed. Ins. Co.*, 538 F.3d at 83 (same).

Finally, contrary to the Fourth Circuit's analysis, interpreting the phrase "agency or instrumentality" as including foreign officials is consistent with the service of process requirements under 28 U.S.C. § 1608(b). In holding that section 1608(b)'s service of process requirements "do[] not contemplate service on an individual," Pet. App. 19a, the court below ignored authorized methods that are equally applicable to both individuals and entities. For example, section 1608(b)(2) authorizes service "in accordance with an applicable international convention on service of judicial documents," 28 U.S.C. § 1608(b)(2), a standard that plainly applies to individuals. *See also id.* § 1608(b)(1), (3) (describing additional methods of service that are equally applicable to individuals and entities). Thus, the Fourth Circuit erred in concluding that a foreign official like Samantar cannot be considered an "agency or instrumentality" for the purpose of the FSIA.

B. The Fourth Circuit Erred In Holding That The FSIA Does Not Apply To Former Officials

The Fourth Circuit also erred in holding that, even if the FSIA applies to individual officials, it does not apply to former officials for actions that they took on behalf of a foreign state.

First, because a former official's immunity flows from the immunity of the "foreign state" that the official represents, 28 U.S.C. § 1603(a), this Court's decision in *Dole Food*—which turned entirely on

when the status of an "agency or instrumentality" under 28 U.S.C. § 1603(b) is determined—does not come into play at all. Rather, the immunity of the foreign state encompasses *all* officialsi acts undertaken on behalf of the state, regardless of whether the responsible officials happen to be in office at the time of suit. Indeed, the relevant jurisdictional inquiry at the time of suit is not the official's employment status, but whether the challenged acts constitute acts of a "foreign state." *See Draft Articles on Jurisdictional Immunities* at 18 (explaining that act-based immunities "are not in any way affected by the change or termination of the official functions of the representatives concerned. . . . because the immunity in question not only belongs to the State, but is also based on the sovereign nature or official character of the activities"). Here, as the Somali government has confirmed, there is no question that Respondents are challenging alleged acts that would have been taken by Samantar in an official capacity on behalf of Somalia. JA 104, 107.

Second, and in any event, *Dole Food* is inapposite even if individual immunity under the FSIA is premised on an individual official's status as an "agency or instrumentality." *Dole Food* only analyzed the majority-ownership prong of 28 U.S.C. § 1603(b)(2) and "never dealt with the acts of a government official" under the separate "organ of a foreign state" prong. *See Belhas*, 515 F.3d at 1286; *see also id.* at 1291 (Williams, J., concurring).

That distinction is crucial because the two prongs of § 1603(b)(2) immunize agencies and instrumentalities based on fundamentally different premises. While immunity "[u]nder the majority-

ownership prong . . . depends solely on [a] foreign state's direct ownership of a majority of [a] corporation's shares," whether an individual official qualifies as an "organ of a foreign state" "rest[s] on the foreign state's exercise of some degree of control and direction of the person's . . . activities." *Belhas*, 515 F.3d at 1291 (Williams, J., concurring) (citing authorities for the proposition that, because the two prongs of § 1603(b)(2) are distinct, an entity may qualify as an "organ" of a foreign state, based on the foreign state's control over the entity, independent of whether it also satisfies the majority-ownership prong); *see also* Dellapenna, *supra*, at 72 (explaining than an organ of a foreign state "serves the interests of and is closely controlled by the foreign state in question"); *Kelly v. Syria Shell Petrol. Dev. B.V.*, 213 F.3d 841, 846 (5th Cir. 2000) (explaining that courts consider, *inter alia*, "whether the foreign state actively supervises the entity" when determining if an entity is an organ) (internal quotation marks omitted).

Moreover, "[t]he corporation and the state have at all times been entities wholly separate and distinguishable from each other and able to act without the presence or even existence of the other." *Belhas*, 515 F.3d at 1286. Indeed, in many instances, the ties between foreign states and their majority-owned corporations are largely "financial," and the latter enjoy a substantial "degree of flexibility and independence from close political control" by the state. *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 624-25 (1983). In contrast, while a state need not form or own corporations in order to act, "[e]very act committed by a sovereign government [must be]

carried out by its officials and agents" under the state's authority and/or control. *Belhas*, 515 F.3d at 1286; *see also id.* ("[I]ndividual officials or agents must act as instrumentalities for anything actually to be done."); *Transaero*, 30 F.3d at 153; *MOD*, 495 F.3d at 1035.

Therefore, a lawsuit against the corporation does not necessarily impugn the state's official acts. In fact, once the state severs or lessens financial ties with the corporation, the "impact on a foreign state of [a U.S. court's] exercising jurisdiction over a corporation it merely owned in the past is at best attenuated" (*e.g.*, "the foreign state may receive a lower sales price for its majority stake if it cannot pass corporate immunity for past deeds along with ownership"). *Belhas*, 515 F.3d at 1291 (Williams, J., concurring). But because the acts of officials *are* acts of the state, an action against an individual for official-capacity acts invariably challenges the acts of the state—whether or not the individual happens to remain in office at the time of suit. *See, e.g.*, *Belhas*, 515 F.3d at 1286.

Denying sovereign immunity to a former official for official-capacity acts would allow a U.S. court to sit in judgment of the official acts of a foreign sovereign, contrary to the most basic underpinnings of foreign sovereign immunity. *Cf. Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 417-18 (1964) ("To permit the validity of the acts of one sovereign State to be reexamined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations.") (internal quotation marks omitted); Fox, *supra*, at 64 (noting that foreign

sovereign immunity recognizes that disputes among nations over official state action should be resolved through diplomacy rather than private civil litigation in foreign courts). Thus, a former official's "lack of immunity for actions undertaken on the state's behalf would have a significant impact on the foreign state and the United States' relations with that state." *Belhas*, 515 F.3d at 1291 (Williams, J., concurring). "To allow the resignation of an official involved in the adoption of policies underlying a decision or in the implementation of such decision to repeal his immunity would destroy" the international "comity" that the FSIA was designed to protect, in a way that permitting lawsuits against formerly state-owned corporations with which the state had largely financial ties does not. *Id.* at 1286 (majority opinion); *see also Dole Food*, 538 U.S. at 479 (explaining that the FSIA "give[s] foreign states and their instrumentalities some protection from the inconvenience of suit as a gesture of comity between the United States and other sovereigns").

Finally, as described above, the pre-FSIA law of foreign sovereign immunity, the substance of which Congress codified, recognized that former officials retained immunity for official-capacity acts. *See supra* at 30-32. In contrast, there was no similar pre-FSIA practice of extending immunity to formerly state-owned corporations, because the recent "massive wave of privatization" of state-owned corporations was "unforeseen in 1976." *See* Dellapenna, *supra*, at 91. Whatever the temporal implications of the majority-ownership prong of § 1603(b)(2), it is "unreasonable" and "implausible" to believe that "Congress intended to make . . . sweeping and counterintuitive changes" to the pre-

FSIA law of sovereign immunity governing former officials "with the simple use of the word 'is'" in the organ-of-a-foreign-state prong of the statute. *Belhas*, 515 F.3d at 1285; *id.* at 1291 (Williams, J., concurring). The FSIA should not be construed to abrogate the very common-law principles that Congress intended to codify. The Fourth Circuit erred in concluding otherwise.

C. The Possibility Of Common-Law Immunity Does Not Cure The Fourth Circuit's Misinterpretation Of The FSIA

It is no answer to the Fourth Circuit's evisceration of the FSIA to suggest that the common law may immunize officials and former officials for state acts even if the statute does not. Such a bifurcated approach to foreign sovereign immunity would undermine Congress's comprehensive statutory scheme.

It is well settled that "general and comprehensive legislation . . . indicates a legislative intent that the statute should totally supersede and replace the common law dealing with the subject matter." 2B *Sutherland Statutory Construction* § 50:5, at text accompanying n.5. Indeed, courts generally presume that federal statutes displace federal common law. *See, e.g., City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981) ("[I]n cases such as the present 'we start with the assumption' that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law.").

This Court has concluded, for example, that because the Federal Water Pollution Control Act Amendments "occupied the field through the establishment of a comprehensive regulatory

program," the Act displaced federal common-law claims for abatement of a nuisance caused by interstate water pollution. *See City of Milwaukee*, 451 U.S. at 307-08, 317. Similarly, the enactment of the Federal Tort Claims Act displaced the Government's entitlement to sovereign immunity in prison litigation cases, *see United States v. Muniz*, 374 U.S. 150, 158 (1963), and 42 U.S.C. § 1983 is the exclusive federal damages remedy for violations of federal constitutional rights by state actors, displacing any *Bivens*-type action implied directly from the Fourteenth Amendment, *see Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 734-35 (1989).

These principles have particular force in the context of the FSIA, which Congress enacted to overturn the common-law procedures used to determine foreign sovereign immunity before 1976, while codifying the substance of pre-FSIA common law. In enacting the FSIA, Congress not only defined the scope of foreign sovereign immunity, but also eliminated the pre-1976 role of the State Department in immunity determinations. *See, e.g., Verlinden*, 461 U.S. at 488; *see also, e.g.*, Letter from Monroe Leigh, Legal Adviser, U.S. Dep't of State, to Edward H. Levi, Att'y Gen., U.S. Dep't of Justice (Nov. 2, 1976), *reprinted in* 75 Dep't St. Bull. 649 (1976) (recognizing that "it would be inconsistent with the legislative intent of [the] Act" for the State Department to "make *any* sovereign immunity determinations after the effective date of" the FSIA) (emphasis added).

In doing so, the FSIA, "[i]n accordance with the practice in most other countries, . . . place[d] the responsibility for deciding sovereign

immunity issues *exclusively* with the courts." 75 Dep't St. Bull. 649 (emphasis added); S. Rep. No. 94-1310, at 9 ("A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process."); 1976 U.S.C.C.A.N. at 6606 (same).

The State Department's pre-FSIA discretion had led to a regime characterized by delay and unprincipled decisions based on political considerations. *See, e.g.*, *Altmann*, 541 U.S. at 690. In transferring *all* immunity determinations to the courts, Congress sought to ensure a uniform, evenhanded approach to foreign sovereign immunity, unencumbered by the shifting pressures and "'uncertaint[ies]'" of domestic and international politics. *Chuidian*, 912 F.2d at 1100 (quoting 1976 U.S.C.C.A.N. at 6607).

A reversion to pre-FSIA common law for individual immunity determinations would contravene Congress's choice by making the statute "optional," allowing litigants to choose between suing foreign states, subject to the restrictions in the Act, and suing individual officials of a foreign state, hoping to secure State Department support for a waiver of common-law immunity. *Id.* at 1102. Indeed, "[l]itigants who doubted the influence and diplomatic ability of their sovereign adversary would choose to proceed against the official, hoping to secure State Department support, while litigants less favorably positioned would be inclined to proceed

against the foreign state directly, confronting the [FSIA] as interpreted by the courts without the influence of the State Department." *Id.* Such a two-pronged approach would reintroduce precisely the sort of unpredictability, lack of uniformity, and political pressures and whims that Congress sought to eliminate from immunity determinations.

If the Court disagrees, however, and concludes that the FSIA does not extend to individuals acting in an official capacity on behalf of a foreign state, it should, at a minimum, make clear that nothing in the FSIA derogates the longstanding common-law immunity that applied to officials and former officials of foreign states. *See supra* at 26-32.

CONCLUSION

The judgment of the Fourth Circuit should be reversed.

Respectfully submitted,

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RESPONDENT'S BRIEF

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IN THE
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MOHAMED ALI SAMANTAR,

Petitioner,

v.

BASHE ABDI YOUSUF, *ET AL.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

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QUESTION PRESENTED

The Foreign Sovereign Immunities Act, 28 U.S.C. §1602 *et seq.*, provides that a "foreign state" shall be immune from the jurisdiction of federal and state courts unless the case falls within one of the statutorily specified exceptions, 28 U.S.C. § 1604.

The question presented is:

Whether the Foreign Sovereign Immunities Act also immunizes from suit a former government official who is sued personally for money damages for acts committed in his official capacity.

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STATEMENT OF THE CASE

A. Legal Framework

1. The Constitution empowers Congress to "define and punish * * * Offenses against the Law of Nations." U.S. Const. Art. I, § 8, cl. 10.

2. The Foreign Sovereign Immunities Act (FSIA) provides generally that a "foreign state" is "immune from the jurisdiction" of federal and state courts, unless the claim falls within one of the statute's specified exceptions, 28 U.S.C. § 1604. Congress defined "foreign state" to "include[] a political subdivision of a foreign state or an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). The FSIA defines "agency or instrumentality" to "mean[] any entity":

> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603(b).[1]

---

[1] Section 1332(c) of Title 28 addresses the citizenship status of corporations and certain legal representatives.

Section 1605 of the FSIA identifies "[g]eneral exceptions" to a state's immunity, such as waivers of immunity and claims arising from a foreign state's commercial activities. 28 U.S.C. §§ 1605(a)(1)-(3). Section 1605 also excepts damages claims filed against a foreign state that arise out of torts in the United States caused by the conduct of either the "foreign state" "or of any official or employee of that foreign state while acting within the scope of his office or employment." 28 U.S.C. § 1605(a)(5). Section 1605A separately denies immunity for damages claims arising from "torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources" for such acts when committed by "an official, employee, or agent" of a foreign state that has been designated a "state sponsor of terrorism." 28 U.S.C. §§ 1605A(a)(1), (a)(2)(A)(i) & (h)(6).

3. The Alien Tort Statute, 28 U.S.C. § 1350, grants federal courts jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The statute creates jurisdiction for treaty-based or federal common law causes of action enforcing universally accepted and carefully defined "international law norm[s]" "admitting of a judicial remedy." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715, 732 (2004). Two such norms are the international prohibitions on torture and on extrajudicial killing. *Id.* at 728; *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980).

4. The Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (reproduced at 28 U.S.C. § 1350 note), creates a federal cause of

action for money damages against "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation" commits torture or extrajudicial killings, *id.* § 2(a). The claimant, however, must first "exhaust[] adequate and available remedies in the place in which the conduct giving rise to the claim occurred." *Id.* § 2(b).

B. Factual And Procedural Background

1. The Republic of Somalia was formed in 1960 when the former colonies of British Somaliland (in the north) and Italian Somaliland (in the south) combined to form an independent nation. State Dep't, *Background Note: Somalia* (Oct. 2009) ("*State Dep't Note*"), http://www.state.gov/r/pa/ei/bgn/2863.htm. In October 1969, Major General Mohamed Siad Barre overthrew Somalia's democratic government, declared himself President, and held that position by military force until he was driven from power in January 1991. *Ibid.*; J.A. 60.

From January 1980 to December 1986, petitioner served as Barre's First Vice President and Minister of Defense, and from January 1987 until September 1990, he served as Prime Minister. During those times, the Barre regime used its military and national security forces to "violently suppress[] opposition movements and ethnic groups, particularly the Isaaq clan in the northern region." *State Dep't Note*, *supra*. The military forces committed countless atrocities against civilians, including the widespread and systematic use of torture and extrajudicial killing. J.A. 61-63. The Barre regime collapsed in 1991, and petitioner fled to Italy. Six years later, he moved to the United States and now resides in Fairfax, Virginia. J.A. 57, 64.

Since the Barre regime fell, Somalia has disintegrated as a unified nation and lacks a functioning central government. *State Dep't Note, supra.* In 1991, former British Somaliland withdrew from the Somali union and formed the independent Republic of Somaliland. *Ibid.* In the meantime, fourteen different transitional governments have attempted to establish themselves in the south(the latest in 2008). The United States has not recognized any government. *See State Dep't Note, supra;* State Dep't, *Background Briefing on U.S. Assistance to the Somalia Transitional Fed. Gov't* (June 26, 2009), www.state.gov/r/pa/prs/ps/2009/06a/125448.htm.

2. The plaintiffs are two United States citizens and three Somaliland residents who either were themselves the victims of petitioner's widespread use of torture or are representatives of the estates of his torture and murder victims.

Bashe Abdi Yousuf is a United States citizen. J.A. 58. He was a businessman in the city of Hargeisa (now in Somaliland) when, in November 1981, he was detained and tortured by National Security Service agents and military police. Yousuf was forced to lie on his stomach with his arms and legs tied behind his back, while a heavy rock was placed on his back. That particular form of torture was devised by the Barre regime and was called the "Mig," because the victim's body resembled the swept-back wings of the Air Force's Mig jets. Yousuf was also subjected to electrocution and deprived of food and water. J.A. 65-66. After being convicted of treason at a summary trial, Yousuf spent the next six years in solitary confinement in a windowless six-foot-by-six-foot cell, which was kept in total darkness

fifteen hours a day. When he was released in May 1989, he promptly fled Somalia. J.A 66-67.

Aziz Deria is a United States citizen who fled Somalia in 1983 after suffering political persecution. His family, including his father, Mohamed, and younger brother, Mustafa, remained in Hargeisa. In June 1988, soldiers kicked down the door of the Deria home and announced their intention to kill all the members of the Isaaq clan. The soldiers then dragged Mohamed from the house. Later that afternoon, the soldiers returned, informed the family that Mohamed had been killed, and then dragged Mustafa from the house. The family never saw either man again. J.A. 68-69.

On the night of July 15, 1985, Jane Doe, a secondary school student in Hargeisa, was arrested at her house, accused of being a "subversive leader," and seized. She was held for three months in a small cell with her arms tied behind her back and her leg chained to the floor. Like many Somali girls, Jane Doe had been subjected to a procedure in which much of her vagina was sewn closed. During her detention, a soldier cut her vaginal skin open with a fingernail file and then raped her. She was raped fourteen more times. J.A. 72-73. After a perfunctory trial, she was sentenced to life in prison. Outside the courthouse, she was beaten by soldiers so severely that she could not stand or walk for months. For the next three and a half years, she was imprisoned in solitary confinement in a tiny cell, with her hands bound at all times. After her release, she fled to a refugee camp in Ethiopia. J.A. 74.

In December 1984, soldiers abducted John Doe I and his brothers and took them to a military

installation. They were subjected to the "Mig" torture and held in a small cell with thirteen men. After a summary trial, they were sentenced to death. Doe I and his brothers were then immediately loaded onto military trucks to be driven to the execution site. A local commander allowed John Doe I to escape. As he fled, he heard the gunshots from his brothers' execution. J.A. 69-72.

In the Spring of 1988, John Doe II was serving as a non-commissioned officer in the Somali National Army when he and numerous other Isaaq officers were arrested and detained by the Army because of their clanship. One afternoon, Army soldiers lined up John Doe II and numerous other Isaaq officers along a riverbank and shot them. John Doe II was shot and fell backwards into the riverbed, unconscious but not fatally wounded. When he regained consciousness, he found himself covered by the dead bodies of other victims. He remained there until the mass execution was completed, and then fled. J.A. 74-75.

3. In November 2004, respondents filed suit against petitioner under the Torture Victim Protection Act (TVPA) and the Alien Tort Statute. J.A. 1. The complaint alleged that petitioner "was an active participant in the enforcement of this system of repression and ill-treatment against members of the Isaaq clan" and was responsible for the plaintiffs' torture and the killings of their family members. J.A. 80-81. The complaint seeks only monetary damages from petitioner. J.A. 99.

In January 2005, the district court stayed proceedings pending the State Department's response to Samantar's request for a statement of interest.

J.A. 5. Two years elapsed without any objection by the State Department to the litigation. J.A. 14-18.

In February 2005, a representative of a southern Somali transitional government wrote to the State Department requesting immunity for Samantar. J.A. 50-52. That letter did not claim that any of petitioner's actions were taken in his official capacity or pursuant to the official policies of the Somali government. *Ibid.* Separately, the Foreign Minister of Somaliland, where almost all of the acts of torture and murder occurred, also wrote to the Secretary of State, explaining that "the people and government of Somaliland are in full support of the lawsuit," and that there was no alternative avenue of redress because petitioner resides in the United States. J.A. 54. *See* State Dep't, *Treaties in Force* 244 (2009) (no extradition treaty).

In February 2007, a different southern transitional government requested that the State Department support petitioner's claim of immunity and asserted that the challenged actions "would have been taken by Mr. Samantar in his official capacities." J.A. 104. In June 2007, the Somaliland Foreign Minister repeated the request that the State Department allow the case to proceed to ensure that petitioner could be held accountable. J.A. 109-111. The letter explained that petitioner's actions were "in violation of Somali law and international law" and "do not concern official actions taken by the Somali government but rather serious human rights violations." J.A. 110.

The district court lifted its stay in 2007, and subsequently granted petitioner's motion to dismiss. Pet. App. 30a-63a. The court, held that the FSIA

applies to former government officials, *id.* at 48a-53a. The court also relied heavily on the two letters submitted by different transitional governments, reasoning that the transitional federal governments were "supported and recognized by the United States as the governing body in Somalia." *Id.* at 54a. The court then concluded that "the government of Somalia has ratified the actions of Samantar, thereby shielding his actions under the cloak of immunity provided by the FSIA." *Id.* at 57a; *see id.* at 61a. The court did not address any alternative grounds for immunity or dismissal. Pet. App. 26a.

4. The court of appeals reversed. Pet. App. 1a-27a. Focusing "on the language of the provision at issue," as well as its structure and purpose, *id.* at 17a, the Fourth Circuit stressed the absence of any "explicit mention of individuals or natural persons" as protected by the FSIA, *id.* at 14a, as well as Congress's narrow expansion of the term "foreign state" in terms "laden with corporate connotations," *id.* at 17a. The court further reasoned that "[c]onstruing 'agency or instrumentality' to refer to a political body or corporate entity, but not an individual, is also consistent with the overall statutory scheme of the FSIA." *Id.* at 19a.

The court of appeals separately held that the FSIA does not apply to former officials because the relevant provisions are written entirely in the present tense. Pet. App. 21a-25a (citing *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003)). The court then remanded the case, holding "only that Samantar is not entitled to sovereign immunity under the FSIA; whether he can successfully invoke an immunity doctrine arising under pre-FSIA common law is an

open question which Samantar is free to pursue." Pet. App. 26a.

Judge Duncan concurred, finding it unnecessary to decide whether the FSIA applies to former officials. Pet. App. 26a-27a.

SUMMARY OF ARGUMENT

This is a case about statutory construction in an area of law where deference to congressional line-drawing and to the judgments of the Political Branches is at its apex. The Foreign Sovereign Immunities Act (FSIA) rests on Congress's express constitutional authority to regulate the conduct of the Nation's foreign and diplomatic relations and to define the lower courts' jurisdiction in the manner that best serves the public good. As the plain text and decisions of this Court have repeated, the FSIA governs the sovereign immunity of foreign "states," and their subdivisions, agencies, instrumentalities, and majority-owned corporations.

Petitioner asks this Court to enlarge FSIA immunity beyond the foreign states and their sub-units to reach every former official of every subdivision and majority-owned corporation of every foreign state (extant or not). That the statutory text will not bear. Nowhere does the FSIA expressly address the immunity of individual officials, let alone former officials like petitioner. To the contrary, the few references the statute does make to government officials expressly distinguish them from the state itself.

Petitioner's notably brief discussion of the FSIA's actual language confesses the lack of textual support for his position. Instead, petitioner invites

the Court to read individual officials into the statute for three reasons, none of which is persuasive.

First, petitioner argues that the text does not foreclose equating officials with the state. But courts are not free to supplement an Act of Congress with whatever Congress did not forbid, particularly in an area so laden with foreign policy consequences. The question, instead, is what immunity the Political Branches granted. Here, they limited it to "states."

In any event, folding individual officials, past and present, into the FSIA would require more than just broadly construing the word "state." The Court would also have to divine out of generally silent or inapt statutory text a series of rules governing the nature and operation of individual immunity, such as defining the type and breadth of immunity, eligibility criteria, limitations and conditions on the immunity (such as scope of authority, *ultra vires* constraints), immunity triggers and termination points, and rules governing the immunity of corporate officials in government-owned corporations. Every one of those decisions is laden with diplomatic-relations consequences that should make the Court wary of stepping beyond where the statutory text treads.

Second, petitioner misapprehends the background rules against which the FSIA was enacted. International and domestic law have not woodenly equated the state and its officials, but instead have developed a collection of specialized immunities, each with different terms and tailored to different categories of foreign officials. Petitioner's position thus reduces to the contention that the FSIA secretly displaced all of those well-developed and distinctly contoured doctrines and, without so much

as a word in the text or history, shoehorned every sitting and former official into immunity rules designed for states *qua* states. That revolutionary approach to official immunity lacks any anchor in the FSIA's text, history, or purpose to the breaking point and, given the deference owed to the judgments of the Political Branches, should not be undertaken without direct congressional guidance.

Third, petitioner bemoans the foreign affairs consequences of not immunizing his responsibility for acts of torture and killings. But the decision in this case is not between immunity or no immunity for foreign officials. It is between force fitting individuals into the statutory immunity of states or instead relying on individual immunities long provided by treaties, statutes, and other customary sources of international law.

In any event, the Constitution assigns to the Political Branches the task of assessing the foreign and diplomatic consequences of immunity provisions. Here, the Political Branches have expressly determined that denying foreign officials who engage in torture and killing a safe haven within the United States best serves the United States military and foreign policy interests. Nothing in the FSIA overrules that judgment.

ARGUMENT

Although split by petitioner into two questions, this case presents only the narrow statutory question of whether the Foreign Sovereign Immunities Act cloaks *former* officials with immunity from personal liability for acts of torture committed under color of their official authority. Respondents seek only money damages against petitioner, a United States

resident who has not been a Somali official for almost two decades. The FSIA's plain text confines its coverage to the foreign "state" and forecloses granting petitioner immunity. Petitioner relies heavily on an assertedly sweeping background principle of immunity that does not exist and his personal concerns about the alleged foreign policy consequences of withholding statutory FSIA immunity. The Constitution, however, assigns the Political Branches "the entire control of international relations," *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893), leaving this Court to enforce the textual lines and limitations Congress has drawn and to respect the Political Branches' judgments about foreign and diplomatic policy.[2]

THE FOREIGN SOVEREIGN IMMUNITIES ACT GOVERNS THE IMMUNITY ACCORDED TO FOREIGN STATES, NOT THE INDIVIDUAL IMMUNITY OF FORMER OFFICIALS

A. The FSIA's Text Limits Its Immunity To Foreign "States" As Distinct From Government Officials

In construing the FSIA, this Court begins, as it does in all cases of statutory construction, "with the

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[2] Because of those separation-of-powers concerns, courts should decide questions implicating foreign sovereign immunity narrowly and not anticipate the resolution of either statutory or international law questions that are neither squarely presented nor necessary to disposition of the case. *See Fiallo v. Bell*, 430 U.S. 787, 796 (1977) (adopting rule of "narrow" review where the decision "may implicate our relations with foreign powers").

text of the statute." *Permanent Mission of India v. City of New York*, 551 U.S. 193, 197 (2007). That is also where this Court's inquiry should end, because the statutory text repeatedly and explicitly distinguishes government officials from the foreign "state" that the FSIA invests with immunity. *See* Sandler, Vagts & Ristau, *Sovereign Immunity Decisions of the Dep't of State*, Digest of U.S. Practice in Int'l Law 1017, 1020 (1977) ("[T]he Foreign Sovereign Immunities Act does not deal with the immunity of individual officials, but only that of foreign states.").

1. Foreign "State" Means a Political Body

At every turn, the FSIA textually announces that its terms define when a foreign "state" does and does not enjoy immunity from suit within the United States. *See, e.g.*, 28 U.S.C. §§ 1602, 1603(a), (b) & (e), 1604, 1605(a)-(d), 1605A(a), 1606, 1607, 1608, 1609, 1610, 1611. Section 1604's conferral of sovereign immunity, in particular, refers only to foreign "state[s]." 28 U.S.C. § 1604.

The ordinary meaning of "state" is a "body politic exercising, through the medium of an organized government, independent sovereignty and control over all persons and things within its boundaries, capable of making war and peace and of entering into international relations with other communities of the globe." *Black's Law Dictionary* 1578 (4th ed. rev. 1968); *see Webster's Third New Int'l Dictionary* 2228 (1976) (defining "state" as a "body politic"). At the time Congress passed the FSIA, the *Restatement (Second) of the Foreign Relations Law of the United States* (1965) likewise defined a "state" as an "entity" – not an individual official – that has

capacities enjoyed only by a collective governmental body, such as having "a defined territory and population under the control of a government," and "engag[ing] in foreign relations." *Id.* § 4; *see Restatement (Third) of the Foreign Relations Law of the United States* § 201 (1987).

None of those definitions even arguably encompasses an individual ministerial official, let alone a former official. And that is no accident. When Congress wishes foreign-relations legislation to address both foreign states and their individual officials, it says so explicitly, rather than silently subsuming the official in broader definitions of the foreign state or governmental entity. In Section 1351 of Title 28, for example, Congress created federal-court jurisdiction over claims against "consuls," "vice consuls," and "members of a mission" separately and distinctly from its jurisdictional provision for "[a]ctions against foreign states," 28 U.S.C. § 1330. Similarly, in the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801(b), Congress defined the "agent[s] of a foreign power" as distinct from the "foreign government" or "foreign power" itself.[3]

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[3] *See also* Economic Espionage Act, 18 U.S.C. § 1839 ("'foreign instrumentality' means any agency, bureau, ministry, component, institution, association, or any legal, commercial, or business organization, corporation, firm, or entity that is substantially owned * * * or dominated by a foreign government," while "'foreign agent' means any officer, employee, proxy, servant, delegate, or representative of a foreign government"). Notably, Article III of the Constitution also separately addresses the constitutional status of suits

Congress thus knew exactly what it was doing by textually confining the FSIA's grant of sovereign immunity to foreign "state[s]," and this Court "will not override" the legislative choice reflected in that choice of language. *Whitfield v. United States*, 543 U.S. 209, 216-217 (2005). Indeed, to respondents' knowledge, *no* court has held that individual officials (let alone former ones) constitute "states" under the FSIA, and petitioner himself never claimed that he is the "state" until he appeared before this Court.

2. The FSIA's Text Distinguishes Officials

Reinforcing that natural reading, every time the FSIA refers to foreign government officials, it does so separately and in language that distinguishes them from the foreign "state" itself.

Section 1605(a)(5) of the FSIA excepts from the Act's general grant of immunity suits that seek tort damages from the "foreign state" for harms caused by the tortious conduct of "that foreign state *or* of *any official or employee of that foreign state* while acting within the scope of his office or employment." (Emphases added.) Reading foreign "state" to encompass the state's officials, as petitioner proposes (Br. 22-24), would render the separate statutory reference to officials and employees "superfluous," *Dole*, 538 U.S. at 477, impermissibly leaving it "with no job to do," *Doe v. Chao*, 540 U.S. 614, 623 (2004).

Petitioner's reading not only would cast statutory language overboard, but also would defy

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involving "Ambassadors, other public Ministers and Consuls," and suits involving "foreign States." U.S. Const. Art. III, § 2.

Congress's use of the disjunctive "or," which emphasizes that the individual official acting in his official capacity is *not*, in Congress's eye, the same as the foreign state. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 229 (1993) ("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings.").

Similarly, the FSIA's exception for state sponsors of terrorism strips designated foreign states of immunity from money damages for personal injury and death claims arising from torture, extrajudicial killing, aircraft sabotage, hostage taking, or material support for terrorists "engaged in by *an official, employee, or agent of such foreign state* while acting within the scope of his or her office, employment, or agency." 28 U.S.C. §1605A(a)(1) (emphasis added). Petitioner's contention that the phrase "foreign state" already encompasses the actions of the state's officials would require the Court to erase three full lines of statutory text.

And the Court's eraser would have to do still more work in subsection 1605A(c), which creates a cause of action against the foreign "state" for harms arising from the terrorist acts "of that foreign state, *or* of an official, employee, or agent of that foreign state." (Emphasis added.) Again, the disjunctive "or" confounds petitioner's claim that his acts of torture and extrajudicial killing were automatically those of the state. Highlighting the point, subsection 1605A(c) authorizes two distinct causes of action – one against the foreign "state" and one against the foreign officials – textually stressing that foreign officials, even when they act within the scope of their

office, are seperate from the states they serve and are individually amenable to suit.

Relatedly, 28 U.S.C. § 1605A(c) provides that the "foreign state" shall be "vicariously liable for the acts of its officials, employees, or agents." Congress thus understood the distinction between lawsuits holding a "foreign state" itself liable and those holding it liable for actions taken by its officials. Petitioner's reading of the FSIA would collapse that distinction. The vicarious liability provision underscores, moreover, that Section 1605A's reference to actions of a foreign state's officials or employees is not a backwards acknowledgment of individual immunity as petitioner posits, but rather is a substantive rule for attributing liability, clarifying that the foreign state cannot avoid either the waiver of immunity or imposition of liability simply by disavowing responsibility for the actions of its officials or employees.

Finally, subsection 1605A(a) limits the abrogation of sovereign immunity to foreign "states" that the Secretary of State has designated to be "state sponsors of terrorism," and further directs that jurisdiction to hear a claim under Section 1605A depends on whether the "foreign state" is a state sponsor of terrorism, 28 U.S.C. § 1605A(a)(2)(A)(i)(I) ("The court shall hear a claim under this section if * * * the foreign state was designated as a state sponsor of terrorism."). If, as petitioner posits, the FSIA includes individual officials within its grant of sovereign immunity, then the cause of action separately created against those officials is a dead letter because individuals cannot be designated *state* sponsors of terrorism, and thus the jurisdictional bar

to claims against them would remain intact. *See* 28 U.S.C. § 1605A(h)(6) ("state sponsor of terrorism" refers to "a country").[4]

Petitioner's argument (Br. 42) that the reference to "official[s]" of "foreign state[s]" in Section 1605A, and its predecessor the now-repealed 28 U.S.C. § 1605(a)(7), supports his claim of immunity by "creating an exception to individual immunity" thus gets the statutory text exactly backwards.[5] Section 1605A expressly limits its "[n]o immunity" clause, 28 U.S.C. § 1605A(a), to "state sponsors of terrorism," which an individual cannot be.[6]

Petitioner also wrongly assumes (Br. 41-42) that Section 1605A's separate creation of a cause of action against individual officials, 28 U.S.C. § 1605A(c), embodied an implicit extinguishment of their individual immunity. But Congress dealt with abrogating state "immunity" in one discrete subsection and then created a "[p]rivate right of action" in a separate subsection, which shows that Congress dealt with the two matters separately and,

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[4] Only Cuba, Iran, Sudan, and Syria are currently designated state sponsors of terrorism. State Dep't, *Country Reports on Terrorism 2008* at 181-186 (April 2009), http://www.state.gov/documents/organization/122599.pdf.

[5] *See* 28 U.S.C. § 1605(a)(7), *repealed*, Pub. L. No. 110-181, Div. A., Title X, § 1083(b)(1)(A)(iii), 122 Stat. 341 (2008).

[6] Section 1605(a)(7) likewise expressly limited the withdrawal of immunity to a "foreign state" that was "designated as a state sponsor of terrorism." Anti-Terrorism and Effective Death Penalty Act, Pub. L. No. 104-132, Title II, § 221(a), 110 Stat. 1241 (1996).

tellingly, found no distinct need to abrogate the sovereign immunity of individual officials as it did the "foreign state."

3. The FSIA's Supplemental Definition of "Foreign State" Excludes Individuals

The FSIA provides that the phrase "foreign state" "includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). Petitioner argues that Section 1603(a) invests him with immunity because (i) the verb "includes" invites expanding the word "state" to former officials, and (ii) a former official is an "agency or instrumentality." Neither argument works.

a. The definition is supplemental, not expansive

Petitioner argues (Br. 22) that all the textual indicia limiting the FSIA to "states" can be cast aside because Congress's use of the verb "includes" in Section 1603(a) invites the Court to sweep former officials into the FSIA. While petitioner is correct (Br. 22-23) that "includes" is sometimes used to introduce a non-exhaustive list, other times it is used only to ensure that a term encompasses a specific item that might otherwise be overlooked. *See Webster's Third, supra,* 1143 (second definition of "include" is "to take in, enfold, or comprise as a discrete or subordinate part or item of a larger aggregate, group, or principle"); *Frame v. Nehls*, 550 N.W.2d 739, 742 (Mich. 1996) ("[T]he word 'includes' can be used as a term of enlargement or of limitation,

and the word in and of itself is not determinative of how it is intended to be used.").

Congress, in fact, often uses "includes" in that more narrow, clarifying way to supplement the meaning of terminology, such as when it provided that "'State' includes the District of Columbia," 3 U.S.C. § 21(a), "'requirement' includes a prohibition," 15 U.S.C. § 7006(10), "'recreational purposes' includes hunting," 7 U.S.C. § 1997(a)(4), "'burial' includes inurnment," 10 U.S.C. § 985(c), "'consolidation' includes a merger," 12 U.S.C. § 36(b)(3), and "'tortious conduct' includes any tortious omission," 42 U.S.C. § 2651(g)(2).

That is also the way Congress used "includes" in the FSIA. The supplementary definition in Section 1603(b) simply extended immunity to carefully defined governmental and corporate entities that had previously – and problematically – been omitted from the term "state." *See Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the H. Comm. on the Judiciary,* 93d Cong., 1st Sess. 39 (1973) (noting that the "traditional view" in foreign sovereign immunity law limited immunity to "the central government of a state," while "other subordinate entities, such as states of a federation, provinces, cantons, counties, and municipalities, are not sovereign and are not entitled to immunity"); *Republic of Austria v. Altmann*, 541 U.S. 677, 712 (2004) (Breyer, J., concurring) ("before the FSIA," "the term 'State' * * * result[ed] in excluding political subdivisions" and some "government corporations").

Furthermore, "a word is known by the company it keeps," *Ali v. Federal Bureau of Prisons*,

552 U.S. 214, 226 (2008), and thus Congress's targeted supplementation of foreign "state" to encompass juridical entities does not invite petitioner's sweeping expansion of foreign "state" to encompass every official or employee, past or present, at every level and subdivision of every foreign state, extant or not. It is telling that the FSIA nowhere focuses on the myriad issues and complications that arise when according immunity to persons, rather than juridical and governmental entities, such as establishing eligibility for immunity, choosing among varying types of individual immunity, varying levels of immunity based on position or function, defining scope of authority and *ultra vires* boundaries, establishing the duration and termination of immunity for transitioning personnel and for extinct states, and explicating what immunity principles apply to corporate officials, 28 U.S.C. § 1603(b). It has taken the Political Branches multiple treaties, conventions, and implementing legislation just to establish the terms of diplomatic and consular immunities. *See* p. 40 & n.12, *infra*. Packing all the details and contours of immunity doctrine for every past and present official at every level of every foreign state (and majority-owned corporation) into the inapposite, state-focused language of the FSIA would strain statutory construction to the breaking point and would launch this Court into a diplomatic-relations decisionmaking enterprise that the Constitution assigns to the Political Branches. "[I]t is the duty of the courts, in a matter so intimately associated with our foreign policy * * * not to enlarge an immunity to an extent which the government * * * has not seen fit to recognize." *Republic of Mexico v. Hoffman*, 324 U.S. 30, 38 (1945).

b. A former official is not an "agency or instrumentality"

Petitioner's alternative argument (Br. 45-47) that former officials qualify as an "agency or instrumentality" fares no better. Subsection 1603(b) defines "agency or instrumentality" as:

> any entity—
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603(b).

That definitional language excludes, rather than embraces, petitioner. First, Congress limited "agency or instrumentality" status to an "entity," a term that, in common parlance, stands in contrast to the word "person." *See, e.g.*, *Republic of the Philippines v. Pimentel*, 128 S. Ct. 2180, 2188 (2008) ("*persons or entities* must be joined in a suit") (emphasis added); *Medellin v. Texas*, 128 S. Ct. 1346, 1360 (2008) ("disputes involving particular *persons or entities*") (emphasis added).

Second, the phrase "separate legal person" in subsection 1603(b)(1) connotes a juridical entity, not a human being, and evidences that Congress had

"corporate formalities in mind." *Dole*, 538 U.S. at 474.[7] That formulation, moreover, stands in sharp contrast to Congress's use of "natural person" to refer to individuals elsewhere in the FSIA. 28 U.S.C. § 1610(f)(1)(B). Congress's use of the adjective "separate" further connotes an entity that exists and is created with some significant independence from the state, an inapt characterization of government officials.

The legislative history of the FSIA confirms that the phrase "separate legal person" was "intended to include a corporation, association, foundation, or any other entity which, under the law of the foreign state where it was created, can sue or be sued in its own name, contract in its own name, or hold property in its own name." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 15 (1976). The specific examples of qualifying entities provided, moreover, were limited to legal entities, not natural persons. *See id.* at 16 (listing, *e.g.*, "a state trading corporation, a mining enterprise, * * * a central bank, * * * or a department or ministry which acts and is suable in its own name").

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[7] *See also Nixon v. Missouri Municipal League*, 541 U.S. 125, 134 (2004) ("In customary usage, we speak simply of prohibiting a natural *or* legal person from doing something.") (emphasis added); *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 625 (1983) ("Separate legal personality has been described as an almost indispensable aspect of the public corporation."); *Enahoro v. Abubakar*, 408 F.3d 877, 881 (7th Cir. 2005) ("separate legal person" has "the ring of the familiar legal concept that corporations are persons," not "natural person[s]").

Third, to respondents' knowledge, there is no precedent in the United States Code (and petitioner cites none) for defining a natural person as "an organ of a foreign state or political subdivision thereof," 28 U.S.C. § 1603(b)(2). Still less can it be said that a foreign state holds an "ownership interest" in or owns "a majority of [the] shares" in one of its officials. *Ibid.*

Fourth, subsection 1603(b)(3) defines an "agency or instrumentality" as an entity that neither has the citizenship status of the purely juridical entities governed by 28 U.S.C. § 1332(c) and § 1332(e), nor was "created under the laws of any third country," 28 U.S.C. § 1603(b)(3). That phraseology, again, undermines petitioner's argument because human beings are not naturally described as "created" under the laws of a nation.

Fifth, even if a human being could conceivably satisfy one of the conditions in subsection 1603(b), that would not suffice because the FSIA conjunctively requires the "agency or instrumentality" to satisfy all three provisions. Given that conjunctive definition, the only way to equate the foreign official as "agent" with an FSIA "agency," as petitioner proposes (Br. 23), would be to perform the "radical surgery" of "substitute[ing] the word 'or' for the word 'and,'" which this Court cannot do. *Chisom v. Roemer*, 501 U.S. 380, 397 (1991).

Petitioner's argument that "agency" includes "agents" also disregards the longstanding distinction, for sovereign immunity purposes, between allowing a suit against an individual government "agent" for money damages, which does not implicate sovereign immunity, and allowing suit against an "agency,"

which does enjoy sovereign immunity. *See FDIC v. Meyer*, 510 U.S. 471, 484 (1994) (*Bivens* damages suits can be brought against "federal *agents*, but [not] federal *agencies*") (emphasis in original).

Finally, the definition of "agency or instrumentality" is repeatedly phrased in the present tense. Thus, even if through some procrustean strain a *current* official were deemed to be an "agency or instrumentality," there is no textual basis for deeming someone who has been out of office for more than a decade to be an agency or instrumentality of a foreign state – especially when, as here, the foreign state itself no longer exists. *See Dole*, 538 U.S. at 478 ("[B]ecause it is expressed in the present tense, [Section 1603(b)(2)] requires that instrumentality status be determined at the time suit is filed.").

B. The Structure Of The FSIA Excludes Former Officials

Just as statutory construction begins with the FSIA's text, "it ends there as well," because the Act's terms are clear in their scope. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999). In any event, the further the Court looks, the worse petitioner's argument gets because the structure of the FSIA confirms that the Act's immunity applies to the foreign state itself, but not to individual officials. *Saudi Arabia v. Nelson*, 507 U.S. 349, 357 (1993) (analyzing FSIA provision in "context").

With respect to petitioner's claim that he is an "agency or instrumentality," the FSIA provision governing service of process on such entities, 28 U.S.C. §1608, speaks exclusively in terms relevant to serving governments, corporations, and business

entities, not individuals. *Compare* 28 U.S.C. §1608(b)(2) (service "by delivery of a copy of the summons and complaint either to an *officer*, a *managing or general agent*, or to any other *agent authorized by appointment or by law* to receive service of process in the United States") (emphasis added), *with* Fed. R. Civ. Proc. 4(h)(1)(B) (similar for service on domestic and foreign corporations).

With respect to petitioner's contention that he is the "state," the provisions governing service on the foreign state itself similarly offer an unwieldy and abnormal means of serving an individual defendant, especially a former official like petitioner, who is present in the United States. Section 1608 authorizes service pursuant to an "applicable international convention on service of judicial documents," 28 U.S.C. § 1608(a)(2); service on "the head of the ministry of foreign affairs" of the foreign state, 28 U.S.C. § 1608(a)(3); and service on the United States Secretary of State, 28 U.S.C. § 1608(a)(4). Federal Rule of Civil Procedure 4's well-established procedures for service on individuals are noticeably absent.

Furthermore, if foreign officials were treated as "foreign states," individuals would become personally liable in suits for their state's commercial transactions under 28 U.S.C. §1605(a)(2), and their personal property could be used to satisfy terrorism-related judgments against the foreign state itself, *see* 28 U.S.C. § 1610(g)(1).[8] "It is difficult to believe that

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[8] In addition, deeming individual officials to be agencies or instrumentalities would subject them to punitive damages

Congress intended * * * that the personal property of every official or employee of a state sponsor of terrorism would be available for execution to satisfy a terrorism-related judgment against the state." U.S. Amicus Br. at 7, *Federal Ins. Co. v. Kingdom of Saudi Arabia* (No. 08-640).

Finally, Congress's parallel grant of jurisdiction over "[a]ctions against foreign states," 28 U.S.C. § 1330, becomes constitutionally problematic if extended to individuals. Section 1330(b) provides that, when service of process is made under the FSIA's terms, "[p]ersonal jurisdiction over [the] foreign state shall exist as to every claim for relief." Section 1330 thus broadly equates service of process with personal jurisdiction in FSIA cases. That blanket establishment of personal jurisdiction may be fine for a foreign state, because it is dubious that it constitutes a "person" within the meaning of the Due Process Clause's requirement of minimum contacts. *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 619 (1992) (reserving the question); *cf. Breard v. Greene*, 523 U.S. 371, 378 (1998) (foreign state is not a "person" under 42 U.S.C. § 1983). But it is not an open question whether an individual haled into a United States court is protected by the Due Process Clause, *see United States v. Verdugo-Urquidez*, 494 U.S. 259, 270-271 (1990). Thus petitioner's reading of "state" as including individuals would raise a serious constitutional question about Congress's displacement of the Fifth Amendment's requirement

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and the attachment of their property on terms not applicable to the foreign state itself. *See* 28 U.S.C. §§ 1606, 1610.

of minimum contacts, *see International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Giving "state" its natural reading avoids that problem. *See Bartlett v. Strickland*, 129 S. Ct. 1231, 1247 (2009) (Court construes statutes to "avoid[] serious constitutional concerns").

C. Reading The FSIA And The Torture Victim Protection Act *In Pari Materia* Reinforces The FSIA's Limitation To States

1. "[I] it is, of course, the most rudimentary rule of statutory construction * * * that courts do not interpret statutes in isolation, but in the context of the *corpus juris* of which they are a part, including later-enacted statutes." *Branch v. Smith*, 538 U.S. 254, 281 (2003) (plurality op. of Scalia, J.). Limiting the FSIA to foreign "state[s]" gives coherence to Congress's related enactments, the Torture Victim Protection Act (TVPA), Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note), and the Alien Tort Statute. Together, those statutes create jurisdiction and authorize causes of action against individual foreign officials who engage in torture and extrajudicial killing under color of their official positions.

By its plain terms, the focal point of the TVPA cause of action is foreign government officials acting "under actual or apparent authority" of a "foreign nation" or "under color of law." 28 U.S.C. § 1350 note, § 2(a). Under U.S. law, that phraseology has long signified the availability of suits holding government officials personally liable for actions taken in their official capacity. *See, e.g.*, 42 U.S.C.

§ 1983; *Hafer v. Melo*, 502 U.S. 21, 25 (1991) ("Personal-capacity suits * * * seek to impose individual liability upon a government officer for actions taken under color of state law."). Such officials may be held individually liable in damages for "acts [taken] within their authority and necessary to fulfilling governmental responsibilities," where those actions violate paramount law. *Hafer*, 502 U.S. at 28-29.

Congress intended that same meaning for the TVPA. *See* S. Rep. No. 249, 102d Cong., 1st Sess. 8 (1991) ("Courts should look to principles of liability under U.S. civil rights law, in particular section 1983 of title 42 of the United States Code, in construing 'under color of law' as well as interpretations of 'actual or apparent authority' derived from agency theory in order to give the fullest coverage possible."); H.R. Rep. No. 367, Pt. I, 102d Cong., 1st Sess. 5 (1991) (similar).

Importantly, Congress's use of the term "individual" in the TVPA was deliberate and – directly contrary to petitioner's argument – was specifically designed to distinguish the individual officials amenable to suit under the TVPA from the foreign "states" entitled to immunity under the FSIA.

> The legislation uses the term "individual" to make crystal clear that foreign states or their entities cannot be sued under this bill under any circumstances: only individuals may be sued. Consequently, the TVPA is not meant to override the Foreign Sovereign Immunities Act (FSIA) of 1976, which renders foreign governments immune from suits in U.S. courts, except in certain instances.

S. Rep. No. 249, *supra*, at 7. Likewise, the House Report stressed that "[o]nly 'individuals,' not foreign states, can be sued under the bill." H.R. Rep. No. 367, *supra*, at 4. Thus, while petitioner sees the individual official and foreign state as one and the same, Congress legislated with the exact opposite viewpoint, emphasizing that the "foreign state" in the FSIA does *not* encompass its individual officials even when acting under color of official authority.

Even worse for petitioner, the legislative history emphasized that the traditional immunities provided by treaty to diplomats and consular officials, and the immunity customarily afforded to heads of state, would not "provide *former* officials with a defense to a lawsuit brought under this legislation." S. Rep. No. 249, *supra*, at 8 (emphasis added). Reading the FSIA to immunize the very individuals and conduct that Congress specifically targeted as outside the FSIA's protection would render the TVPA a hollow shell. This Court "cannot accept the novel proposition that th[e] same official authority" that triggers liability under the TVPA simultaneously "insulates [the defendant] from suit." *Hafer*, 502 U.S. at 28.

Rather than put the FSIA and TVPA at cross-purposes, "[t]he correct rule of interpretation is" that "divers statutes relate[d] to the same thing * * * ought all to be taken into consideration in construing any one of them," and when, as here, "it can be gathered from a subsequent statute *in pari materia*, what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute." *United States v.*

Freeman, 44 U.S. (3 How.) 556, 564-565 (1845) (quoted in *Branch*, 538 U.S. at 281 (plurality op. of Scalia, J.)).

That rule of deference to the interrelation of legislation is most vital when, as here, the statutes work together to effectuate the foreign policy judgments of the Political Branches. While petitioner is understandably eager to empty the TVPA of force, Congress enacted the law:

- as an exercise of its constitutional authority to "punish * * * Offenses against the Law of Nations," U.S. Const. Art. I, § 8, cl. 10;
- to meet the United States obligations under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, 1465 U.N.T.S. 85, S. Treaty Doc. 100-20 (1988), which authorizes the United States to provide redress against torturers within its territory, *id.* Arts. 5 & 14; S. Rep. No. 249, *supra*, at 3; H.R. Rep. No. 55, Pt. I, 101st Cong., 1st Sess. 2-3 (1989);
- to protect members of the United States military and prisoners of war, 137 Cong. Rec. S1378-1379 (daily ed. Jan. 31, 1991) (Sen. Specter); and
- to ensure that the United States shores would not become a "safe haven" for torturers, S. Rep. No. 249, *supra*, at 3.

The Court should not interpret the FSIA in a way that renders those sensitive and calibrated foreign policy judgments for naught.

Indeed, the call for deference to the textual lines Congress has drawn is redoubled here, because

the Constitution tasks Congress not just with defining the law of nations, but also with establishing the jurisdiction of the lower federal courts "in the exact degree and character which to Congress may seem proper for the public good." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 433 (1989).

2. The district court relied upon a single statement in the legislative history of the TVPA that, "[t]o avoid liability by invoking the FSIA, a former official would have to prove an agency relationship to a state, which would require that the state 'admit some knowledge or authorization of relevant acts.' 28 U.S.C. 1603(b)." Pet. App. 57a. But that is of no help to petitioner.

First, because of the wholesale national destruction wreaked by petitioner and his colleagues, no foreign state even exists in the former Somalia, let alone has admitted knowledge or authorization of petitioner's acts. The Somaliland government (which controls the area where most of the actions at issue occurred) supports the litigation. Pet. App. 54a, 110a. The current (unrecognized) transitional government has made no objection to the litigation. And the earlier letters from different, now-collapsed, transitional governments never asserted *any* authorization of petitioner's actions, J.A. 50-52, and only one even claimed that petitioner committed the acts "in his official capacities" – that is, under color of law, J.A. 104. Neither has the Executive Branch objected to the litigation. *See generally National City Bank v. Republic of China*, 348 U.S. 356, 360 (1955) (according "significant weight" to State

Department's "failure or refusal to suggest such immunity").

Second, and in any event, the "admit or authorize" language quoted by the district court exists nowhere in the FSIA or even in the United States Code. Only the words enacted into law count. *See Heintz v. Jenkins*, 514 U.S. 291, 298 (1995).

Third, as the rest of the Report makes clear, the type of official authorization and approbation to which the statement might have referred would have required far more than that an official have acted in his official capacity. That is because the Report goes on to confirm the statute's core application to "torture and extrajudicial killings committed by officials both within and outside the scope of their authority." S. Rep. No. 249, *supra*, at 8.

D. International And Domestic Law Have Long Distinguished Between The Immunities Of Foreign Officials And Those Of The Foreign State

Confounded by the FSIA's straightforward text, petitioner gives short shrift to the Act's language (Br. 22-24) and devotes much of his brief to arguing (Br.24-45) that a suit against a former official should be treated like a suit against a "state" "since the state can only act through its officials" (Br. 22). Petitioner further contends (Br. 24-41) that background principles of international law throw a broad and undifferentiated cloak of immunity over all official acts of all former officials, and the FSIA must be construed to codify that (supposed) rule of immunity. That argument fails on two levels. First, petitioner's foundational assumption about the role of

background law in construing the FSIA is wrong in this case. Second, no such blanket rule of official immunity from suit exists.[9]

1. Background Principles Do Not Require Construing the FSIA to Immunize Individuals

Petitioner invokes (Br. 25, 40) the canon that statutes "ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). But that starting point is all wrong.

First, because the text is clear, resort to petitioner's background canon is unnecessary. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) ("When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.").

Second, and in any event, petitioner's argument begs the very question presented in this case: whether Congress intended to address the immunity of individual officials in the FSIA at all, or whether it chose instead to leave those individuals with the distinct and specialized forms of immunity provided by treaties, statutes, or other customary sources of international law. The choice thus is not,

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[9] The court of appeals expressly reserved and remanded the question whether petitioner might enjoy an alternative form of immunity, Pet. App. 26a, and the questions presented in the petition are limited to the narrow question of statutory FSIA immunity, Pet. i, 13; *see* Pet. Br. i.

as petitioner's argument assumes, between FSIA immunity or no immunity. It is between shoehorning individuals into an immunity designed for "states" or leaving officials to the specialized doctrines that have long governed their immunity. Absolutely nothing in the "law of nations" compelled Congress to include foreign officials in the *statutory* FSIA protection it accorded to states, rather than to leave their immunities governed by other rules of law.[10]

Third, international law specifically permits the United States to hold those within its territory accountable, both criminally and civilly, for acts of torture, rape, and extra-judicial killing. *See* Convention Against Torture, *supra*, Arts. 4, 5 & 14. Both the United States and the former Somalia are parties to the Convention Against Torture. *See* United Nations Treaty Collection, *Status of Convention Against Torture* (2010), http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-9.en.pdf. Somalia thus long ago disavowed any governmental interest in or authority for petitioner to engage in torture. *See* Convention Against Torture, *supra*, Art. 2(2) ("No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.").

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[10] For the same reason, petitioner's repeated statements (Br. 21, 25) that the FSIA was intended to codify international law at the time of the statute's enactment say nothing about which aspects of international law Congress was codifying.

Fourth, parts of the FSIA – in particular its expropriation and "state sponsors of terrorism" provisions, 28 U.S.C. §§ 1605(a)(3), 1605A – are deliberate congressional departures from customary international law.[11] Indeed, petitioner himself cannot decide if the FSIA preserves or supersedes customary law. *Compare* Pet. Br. 18, *with* Pet. Br. 20. Congress undisputedly has the power to depart from international law. *See Medellin*, 128 S. Ct. at 1359 n.5. And when legislation does depart from background international law in at least some respects, the statutory text, rather than petitioner's canon, is the proper guide for determining the precise path that Congress forged. *See Pavelic & LeFlore v. Marvel Entertainment Grp.*, 493 U.S. 120, 125 (1989).

2. United States Law Has Long Distinguished Between the Immunities of Individual Officials and Those of the State

In any event, the background principle against which Congress enacted the FSIA is the longstanding tradition in domestic and international law that the individual and the state are not inherently the same for purposes of suit. Indeed, "the principle that an agent is liable for his own torts 'is an ancient one and

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[11] *Foreign Sovereign Immunities Act: Hearing on S. 825 Before the Subcomm. on Courts and Administrative Practice of the Sen. Judiciary Comm.*, 103d Cong., 2d Sess. 12-13 (1994) (Jamison Borek, Deputy Legal Adviser, State Dep't); J. Donoghue, *Taking the "Sovereign" Out of the Foreign Sovereign Immunities Act*, 17 Yale J. Int'l L. 489, 538 n.4 (1992).

applies even to certain acts of public officers or public instrumentalities.'" *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687 (1949); *see Sloan Shipyards Corp. v. United States Shipping Board Emergency Fleet Corp.*, 258 U.S. 549, 567 (1922) ("[B]ut the agent, because he is agent, does not cease to be answerable for his acts."). That rule applies notwithstanding that "the sovereign can act only through agents." *Larson*, 337 U.S. at 688.

The critical factor in determining when a suit against an official can be equated with a suit against the state is not, as petitioner assumes (Pet. i; Pet. Br. 21-24), the capacity in which the official acted (whether "official" or not), but the capacity in which he is sued. "[T]he phrase 'acting in their official capacities' is best understood as a reference to the capacity in which the state officer is sued, not the capacity in which the officer inflicts the alleged injury." *Hafer*, 502 U.S. at 26.

That distinction is far "more than a mere pleading device": it determines when officials "come to court as individuals" and when they come purely as representatives of "the government that employs them." *Hafer*, 502 U.S. at 27. Suits seeking "the payment of damages by the individual defendant" do not trigger sovereign immunity because "[t]he [money] judgment sought will not require action by the sovereign or disturb the sovereign's property." *Larson*, 337 U.S. at 687-688; *see id.* at 688 (suit against official for "compensation for an alleged wrong" is not against the state, but suit seeking injunctive relief is against the state if it results in "compulsion against the sovereign, although nominally directed against the individual officer");

see also Alden v. Maine, 527 U.S. 706, 757 (1999) ("[A] suit for money damages may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct * * * so long as the relief is sought not from the state treasury but from the officer personally.").

Thus, a suit for personal money damages from an official does not constitute a suit against the state because the damages will be awarded only if the officer's actions exceeded limits on his authority imposed by controlling law. The official's "actions beyond those limitations are considered individual and not sovereign actions." *Larson*, 337 U.S. at 689. By violating the law, "[t]he officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden." *Ibid.*

It is only when the form of relief sought operates against the state – such as suits seeking not money damages against the individual, but relief compelling or restraining the actions of the sovereign itself (*i.e.*, specific or injunctive relief) – that immunity is triggered. And even then, immunity attaches *not* because the individual official is the state, but because the *form of relief* sought by the plaintiff's claims would operate upon the sovereign and thus renders the case "in substance, a suit against the Government." *Ibid.* It is the operative "effect of the judgment" in "restrain[ing] the Government from acting, or compel[ling] it to act" that determines whether the state is the real party in interest and thus triggers sovereign immunity. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 n.11 (1983); *see Altmann*, 541 U.S. at

677, 709 (Breyer, J., concurring) (noting the distinction between the sovereign immunity of a state and the personal immunities of individuals).

For that reason, suits that seek to enforce contractual obligations to which the state would be a party or to adjudicate a sovereign's title to state-owned property are deemed to be suits against the sovereign, regardless of whether an official is the nominal defendant. *See Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 281-287 (1997) (suits that are the functional equivalent of quiet title actions barred by sovereign immunity); *Seminole Tribe v. Florida*, 517 U.S. 44, 74-75 (1996) (suit that would compel the creation of a compact to which the State would be a contracting party barred by sovereign immunity). By contrast, suits seeking money damages from former officials in their personal capacity are suits against the individual, not the state.

3. International Law Similarly Distinguishes Between the Individual and the State

Contrary to petitioner's premise (Br. 22-41), international law has long treated individual officials as distinct from the foreign state for immunity purposes, both by developing distinct immunity doctrines for foreign officials and by generally equating a suit against an official with a suit against the state only when the judgment would operate against the state itself.

a. Specialized individual immunities, not the state's own immunity, apply to officials

Rather than cloak officials in the state's own immunity, international law has developed and long

recognized "specialized immunities" to protect particular foreign officials from suit. *Restatement (Second), supra*, § 66, cmt. b. For example, customary international law has long accorded immunity to diplomats, individuals on official missions, and other foreign representatives. *See, e.g., Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 138-139 (1812). Those immunities are now governed by treaties and statutes.[12] In addition, customary international law recognizes other immunities, like "head of state" immunity for the sitting head of a Nation. *See, e.g., id.* at 136; *Altmann*, 541 U.S. at 709 (Breyer, J., concurring).[13]

This Court has also developed the "act of state" doctrine that, although not an immunity from suit, enforces the separation of powers by limiting the federal courts' examination of actions taken "within its own territory by a foreign sovereign government,

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[12] *See* Vienna Convention on Diplomatic Relations, April 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 92 (diplomatic immunity); Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 691 (consular immunity); NATO Status of Forces Agreement, June 19, 1951, 4 U.S.T. 1792; 199 U.N.T.S. 67 (immunity of NATO military and civilian personnel); Diplomatic Relations Act, 22 U.S.C. § 254a *et seq.*; United Nations Headquarters Act, Pub. L. No. 80-357, 61 Stat. 767; International Organizations Immunities Act, 22 U.S.C. § 288 *et seq.; see also* Foreign Missions Act, 22 U.S.C. § 4301 *et seq.*

[13] That is of no help to petitioner, because the Somali Constitution designated the President, not the Prime Minister, the head of state. Constitution of the Somali Democratic Republic, Art. 79 (reproduced at Pltfs. Opp. To Motion to Dismiss, Exh. 2.).

extant and recognized by this country at the time of suit." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964). The doctrine focuses not on the identity of the defendant, but on "the relief sought or the defense interposed." *W. S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 405 (1990). The act of state doctrine has been applied in resolving on the merits actions against individual foreign officials who were acting in their official capacity. *See Underhill v. Hernandez*, 168 U.S. 250, 254 (1897). "[T]he FSIA in no way affects application of the act of state doctrine." *Altmann*, 541 U.S. at 701.

The fact that international law has created specialized immunities for certain foreign officials that are separate and apart from the immunity accorded to the state itself takes the legs out from under petitioner's argument. International law, both generally and as implemented by the Political Branches, plainly does not and has not automatically equated the individual official and the state; it has developed separate and distinct immunity doctrines for each. *See Amerada Hess*, 488 U.S. at 436 n.4 (noting that, even if foreign state were immune under Alien Tort Statute, a foreign official could be sued). As the *Restatement* explains, "a distinction must be made between" the state and its officials. *Restatement (Second), supra*, cmt. b. That is exactly what Congress did in the FSIA.

b. International law focuses on the operation of judgments

For purposes of determining whether and when a suit against an official is, in the eyes of the law, a suit against the foreign state, international

law generally focuses on the effect of the judgment on the foreign state, not whether the official acted in his official capacity.

(i) The *Restatement (Second)*, which was in effect at the time the FSIA was enacted, was explicit that the immunity of a foreign state would extend to the official-capacity acts of a "public minister, official, or agent of the state" only "if the effect of exercising jurisdiction would be to enforce a rule of law against the state," *id.* § 66.[14] Thus, like domestic law, the *Restatement* hinged sovereign immunity not on whether the individual acted in his official capacity as petitioner posits, but the compulsive effect of the judgment on the state.

The *Restatement*'s accompanying illustrations confirmed the point, explaining that a suit seeking to enforce a contract for military supplies entered into by the government constitutes a suit against the sovereign notwithstanding the naming of the contracting official as the defendant. *Restatement (Second), supra* (Illustration 2). That is because, regardless of who the nominal defendant is, the judgment in that case would contractually obligate the state itself either to perform the contract or to pay contract damages from its treasury. *See also Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1097, 1100, 1103 (9th Cir. 1990) (suit against official for official-capacity actions deemed a suit against the foreign state because it sought damages for breach of a contractual letter of credit between the state and

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[14] The Second Circuit in *Matar v. Dichter*, 563 F.3d 9, 14 (2009), omitted that critical qualification.

the plaintiff); *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 670-671 (D.C. Cir. 1996) (employment contract with government); *cf. Seminole Tribe, supra; Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 262-264 (1999) (sovereign immunity attaches to actions seeking to force the payment of contract damages from "funds in the Treasury").

Similar to domestic law, the *Restatement* contrasted such claims with those seeking to hold individual officials personally responsible for acts they took in an official capacity. For such claims, individual officials "do not have immunity from personal liability even for acts carried out in their official capacity." *Restatement (Second), supra*, cmt. b; *see also* Vienna Convention on Consular Relations, Art. 43, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (consular officials subject to suit for "damage arising from an accident in the receiving State caused by a vehicle, vessel or aircraft" when performing consular functions). The modern *Restatement (Third), supra*, is even worse for petitioner, omitting any provision for extending the immunity of the state to individual officials, *id.* §§ 461-466, and specifically providing that, "[e]ven if a suit against the sovereign is barred, there may be a remedy by suit against a responsible official." *Id.* § 907, cmt. c (1987).

(ii) The foreign court decisions on which petitioner relies largely mirror the *Restatement*'s framework. In so doing, they greatly undermine petitioner's assertion that there is such a well-established and sweeping doctrine of official immunity that the Court must graft officials onto the FSIA's text. In *Grunfeld v. United States*, 3 N.S.W.R. 36 (N.S.W. Sup. Ct. 1968), for example, the

Australian court afforded immunity to a United States official because the claim sought an injunction to enforce a contract to which the United States was a party, and thus "the interests or property of the State are to be the subject of adjudication," *id.* at ¶ 50. *See also Syquia v. Almeda Lopez* (Phil. Sup. Ct. 1949) (suit to enforce contractual lease agreements on which the United States was the lessee, and so the "real party in interest * * * is the United States of America"); *Holland v. Lampen-Wolfe*, 1 W.L.R. 1573 (U.K. H.L. 2000) (act of state doctrine; to activity by military official on U.S. military base is part of "the performance of traditional sovereign functions regarding a state's armed forces"); *Church of Scientology Case*, 65 I.L.R. 193 (Germany Fed. Sup. Ct. 1978) (suit seeking injunction against Scotland Yard investigative report barred; acts were "so intrinsic a part of state authority"); *Jaffe v. Miller*, 13 O.R.3d 745 (C.A. 1993) (immunity accorded for prosecution in the name of the State of Florida); *cf. Jones v. Ministry of Saudi Arabia*, 1 A.C. 270 (H.L. 2006) (while granting immunity to an official, court specifically notes that United States law under the TVPA and Alien Tort Statute might be different).

The domestic authorities that petitioner cites follow a similar track. *Underhill*, for example, is an act of state case that affirmed a judgment in the defendant's favor on the merits, not a jurisdiction-barring grant of immunity. 168 U.S. at 252, 254; *see Alfred Dunhill v. Republic of Cuba*, 425 U.S. 682, 705 n.18 (1976) (act of state doctrine and sovereign immunity may "point to different results in certain cases"). In addition, while this Court held in *Underhill* that "acts of legitimate warfare" cannot be

the basis for liability, *id.* at 253, the Court noted that caselaw dictated a different outcome in "[c]ases respecting arrests by military authority in the absence of the prevalence of war," or acts by "revolutionary bodies" "vex[ing] the commerce of the world on its common highway," *id.* at 254. Rather than help petitioner, *Underhill* thus confirms that actions in violation of the law of nations like torture offer individual officials no immunity from suit.[15] *See also Ricaud v. American Metal Co.*, 246 U.S. 304, 305-306 (1918) (act of state case; injunctive relief in dispute over title to property); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303 (1918) (act of state doctrine applied to replevin action concerning "title to property"); *Heaney v. Government of Spain*, 445 F.2d 501, 504-505 (2d Cir. 1971) (suit against consular representative implicating the Vienna Convention; effort to enforce a contract; sovereign immunity applied because "the effect of exercising jurisdiction would be to enforce a rule of law against the state"); *Bradford v. Director Gen. of R.R.s of Mexico*, 278 S.W. 251, 251-252 (Tex. Civ. App. 1925) (effort to enforce a contract to which the government of Mexico was a party and to obtain contract damages from the Mexican treasury); *Oliner v. Canadian Pac. Ry. Co.*, 311 N.Y.S.2d 429, 434 (N.Y. App. Div. 1970)

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[15] *Underhill*'s sweeping description of the act of state doctrine, 168 U.S. at 252, was subsequently refined by this Court in *Sabbatino*, 376 U.S. 398. Of particular relevance here, the Court stressed that the act of state doctrine only applies to a foreign government "extant and recognized by this country at the time of suit." *Id.* at 428. There is no such government in the former Somalia.

(applying act of state doctrine; adjudicating Canadian government's ownership of property).[16]

At bottom, where petitioner desires a wide blanket of immunity, international and domestic law provide only patch squares of specialized immunities, and where petitioner desires a rule reflexively equating suits against officials with suits against the state, international and domestic law offer a far narrower focus on the nature of the judgment sought and its operation against the state. Given the FSIA's silence about immunizing individuals, the lack of any well-documented (let alone settled) international rule of "official acts" immunity, and the foreign-relations consequences of courts signaling that former officials will automatically be swaddled in absolute immunity for all of their official actions, the Court should wait "for legislative guidance before exercising innovative authority" in this area. *Sosa*, 542 U.S. at 726.

(iii) To be sure, the distinction drawn in immunity doctrines between the state and state officials reflected in the *Restatement* and

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[16] The Attorney General opinion on which petitioner relies (Br. 27) actually cuts the other way because no immunity was asserted by the United States. Instead, perhaps anticipating the act of state doctrine, the Attorney General expressed his view that the court would accord proper respect to the defendant's actions "in pursuance of his commission." 1 Op. Att'y Gen. 81 (1797). *Greenspan v. Crosbie*, No. 74 Civ. 4734, 1976 WL 841 (S.D.N.Y. Nov. 23, 1976), simply dismissed the individual defendants without elaboration based on an assertion of immunity by the United States, tellingly granting them an immunity that was *different* from that accorded the foreign state.

international law is not constitutionally compelled as it is under the Eleventh Amendment and the Constitution's separation of powers. Foreign sovereign immunity is the product of comity, not constitutional compulsion, *Altmann*, 541 U.S. at 696, and thus is subject to modification at the Political Branches' direction. But that simply makes petitioner more, not less, amenable to suit than his domestic counterparts, and makes it more, not less, appropriate to enforce the limitations on sovereign immunity reflected in the text of both the FSIA and the TVPA. Furthermore, in enacting the TVPA, both the House and Senate Reports stated that domestic-law principles would provide the proper framework for defining the amenability to suit of foreign officials for acts of torture and extrajudicial killing. *See* S. Rep. No. 249, *supra*, at 8; H.R. Rep. No. 367, Pt. I, *supra*, at 5.[17]

Most importantly, the central point of comity is to afford the foreign government the "same consequent immunity from suit" – not better immunity – as the sovereign "enjoys itself within its own dominions." *Long v. The Tampico & Progresso*, 16 F. 491, 495 (1883); *see Schooner Exchange*, 11 U.S. (7 Cranch) at 137 (international comity promotes the "perfect equality" of nations); *Restatement (Third)*,

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[17] *See also Velasco v. Government of Indonesia*, 370 F.3d 392, 399 (4th Cir. 2004) (noting domestic and international law parallels); *Lyders v. Lund*, 32 F.2d 308, 309 (N.D. Cal. 1929) (whether foreign state immunity applies to official "should be similar to that used in determining whether or no[t] a suit against a state officer [is] an action against a state within the meaning of the Eleventh Amendment").

supra, § 907, cmt. c (liability of foreign officials may parallel liability of "a United States official on the ground that his action was unconstitutional or contrary to law or treaty"); Civil Liability for Acts of State Sponsored Terrorism of 1996, Pub. L. No. 104-208, Div. A, Title I, § 101(c), 110 Stat. 3009-172 (codified at 28 U.S.C. § 1605 note) (action permitted only where domestic liability is equivalent).

(iv) Finally, petitioner's argument (Br. 22) that "state" should be construed broadly because "there is a presumption *in favor* of preserving sovereign immunity" fails on two levels. First, the question here is not whether traditional forms of individual official immunity are preserved, but whether they were statutorily supplanted by the FSIA. The presumption says nothing about that. Second, statutory grants of foreign sovereign immunity should be construed circumspectly because the court does not lightly choose "to create a privileged class, free from liability for wrongs inflicted" or to put government agents "above the law." *Hopkins v. Clemson Agricultural College*, 221 U.S. 636, 643 (1911). That is particularly true when, as here, Congress designed a statute specifically to ensure that a "privileged class" would be held accountable in court. *See Butz v. Economou*, 438 U.S. 478, 501 (1978) (common law immunity principles cannot leave an Act of Congress "drained of meaning").

4. Former Officials Are Not the State

Petitioner's quest for FSIA immunity fails for yet another reason. His task is to prove that the FSIA equates *former*, officials with the "state," even when that foreign state no longer exists at the time of

suit and even when the former official has chosen to take up residence in this Country. In other words, petitioner asks this Court to hold, in the absence of any textual guidance, that federal law compels that he be granted absolute immunity from suit in his *home court*, against the laws of his chosen home country, based on his work nearly two decades ago for a foreign state that he helped drive to extinction – an immunity, moreover, that is *greater* than what U.S. law would afford to *sitting* (let alone former) U.S. officials in U.S. courts.

That makes no practical sense, and nothing in the FSIA, international law, or comity principles requires it. Throughout the FSIA, references to the foreign state and to its agencies or instrumentalities are expressed in the present tense. For example, an entity can be characterized as an "agency or instrumentality of a foreign state" only if it "*is* a separate legal person," "*is* an organ of a foreign state or political subdivision thereof" or "is owned by a foreign state," and "*is* neither a citizen of a State of the United States * * * nor created under the laws of any third country." 28 U.S.C. §1603(b) (emphases added); *see Dole*, 538 U.S. at 478 ("[T]he plain text" of Section 1603(b)(2), "because it is expressed in the present tense, requires that instrumentality status be determined at the time suit is filed."). Congress's use of the present "verb tense is significant in construing" the FSIA. *United States v. Wilson*, 503 U.S. 329, 333 (1992); *see Stafford v. Briggs*, 444 U.S. 527, 535-536 (1980) ("[L]anguage, cast by Congress in the present tense, can reasonably be read as describing the character of the defendant at the time of the suit.").

Tellingly, when Congress wanted the FSIA to apply to an entity's status at the time of the underlying events, rather than at the time of filing suit, it said so. *See* 28 U.S.C. § 1605A(a)(2)(A)(i)(I) (no immunity if "the foreign state was designated a state sponsor of terrorism at the time the act * * * occurred"). Congress's selective inclusion and exclusion of the present verb tense must be given full effect. *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 63 n.4 (1987) ("The fact that Congress consciously chose the past tense to describe the Administrator's new authority to assess civil penalties suggests that Congress knows how to target past violations when it wants to do so."); *Barrett v. United States*, 423 U.S. 212, 217 (1976) ("Congress * * * used the present perfect tense elsewhere in the same section * * * in contrast to its use of the present tense" in the provision at issue.).[18]

That textual focus on the present status of the purported sovereign accords with the "longstanding principle" that "the jurisdiction of the Court depends upon the state of things at the time of the action brought." *Dole*, 538 U.S. at 478 (citing additional

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[18] Petitioner contends (Br. 48) that *Dole Food*'s focus on Congress's verb tense should be limited to the majority-ownership prong of 28 U.S.C. § 1603(b)(2). But petitioner nowhere explains how the Court could, with any faithfulness to statutory text, conclude that the same word, "is" should be given different meanings within the same statutory section. *See Mills Music, Inc. v. Snyder*, 469 U.S. 153, 164-165 (1985) ("It is logical to assume that the same word has the same meaning when it is twice used earlier in the same sentence.").

cases). In addition, it is a "classic principle" of international law that "sovereign immunity" is "about a defendant's *status* at the time of suit, not about a defendant's *conduct* before the suit." *Altmann*, 541 U.S. at 708 (Breyer, J., concurring) (citing, *inter alia*, *Ex-King Farouk of Egypt v. Christian Dior*, 84 Clunet 717, 24 I.L.R. 228, 229 (CA Paris 1957) (former king not entitled to head of state immunity)); *see also The Sapphire*, 78 U.S. 164, 168 (1870) ("[S]overeignty does not change, but merely the person or persons in whom it resides.").[19]

E. Torture And Extra-Judicial Killing Cannot Be Within The Lawful Scope Of An Official's Authority

Because "of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world," *Filartiga*, 630 F.2d at 880, whatever immunity could be granted to officials for legitimate governmental acts, international law *denies* torturers immunization for their actions and precludes foreign states from cloaking such actions with official authorization. *See Larson*, 337 U.S. at 702. That leaves no immunity for the FSIA to enforce. "[T]he

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[19] Even were the FSIA applicable to former officials, this Court would have to remand for a determination of whether a failed former state with no recognized government constitutes a "foreign state" under the FSIA and thus whether there is any FSIA immunity for petitioner to share. *See* Pet. App. 11a n.3 (reserving question); *see also Ungar v. Palestine Liberation Org.*, 402 F.3d 274, 288 (1st Cir. 2005); *Restatement (Second), supra* § 4; *Restatement (Third), supra*, § 201.

torturer has become – like the pirate and slave trader before him – *hostis humani generis*, an enemy of all mankind." *Filartiga*, 630 F.2d at 890.[20]

Here, petitioner's actions violated Somali law, J.A. 110, remain "wholly unratified" by any current government (recognized or not) in the former Somalia, and transgressed "clear and unambiguous" universal prohibitions on torture and killing. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 819-820 (D.C. Cir. 1984) (Bork, J., concurring). Congress's enactment of the TVPA, with the clear textual expectation that individual officials would be held liable for official acts of torture and extra-judicial killing, likewise reflects the shared judgment of the Political Branches that such conduct cannot be

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[20] *See Prosecutor v. Anto Furundzijia*, 1998 WL 34310018, Case No. IT-95-17/1-T, ¶ 155 (Int'l Crim. Tribunal for the Former Yugoslavia Dec. 10, 1998) ("The fact that torture is prohibited by a peremptory norm of international law * * * serves to internationally delegitimise any legislative, administrative or judicial act authorising torture"); *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte* (No. 3), [2000] 1. A. C. 147, 205 (U.K. House of Lords) (Lord Browne-Wilkinson) ("[T]he notion of continued immunity for ex-heads of state is inconsistent with the provisions of the Torture Convention."); *id.* at 261-262 (Lord Hutton) (acts of torture "cannot be regarded as functions of a head of state under international law when international law expressly prohibits torture as a measure which a state can employ in any circumstances whatsoever"); U.S. Amicus Br., *Filartiga*, *supra*, at 16 n.34 ("In exchanges between United States embassies and all foreign states with which the United States maintains relations, it has been the Department of State's general experience that no government has asserted a right to torture its own nationals.").

immunized from judicial inquiry by the "fiat" of foreign governments, *Scheuer v. Rhodes*, 416 U.S. 232, 248 (1974), because, as a matter of United States law, such acts cannot be within the scope of authority of any foreign official.[21] The FSIA should not be construed to grant an immunity that would confound the congressional judgment on which enactment of the TVPA was predicated.

F. Foreign Policy Judgments Are For The Political Branches

Petitioner protests at length (Br. 34-41) that excluding foreign officials from the FSIA will have adverse foreign policy and national security implications for the United States. That makes no sense. Non-FSIA sources of immunity remain intact. Those same doctrines served the United States' foreign-policy interests for the first two centuries of its existence without the cataclysmic consequences petitioner and his amici predict.

To be sure, those specialized immunities may offer no refuge in U.S. courts to petitioner, a U.S. resident and former official of a failed state, when sued by U.S. citizens under a U.S. law for acts of

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[21] *See also Enahoro v. Abubakar*, 408 F.3d 877, 893 (7th Cir. 2005) ("[O]fficials receive no immunity for acts that violate international *jus cogens* human rights norms (which by definition are not legally authorized acts)."); *Kadic v. Karadzic*, 70 F.3d 232, 250 (2d Cir. 1995) ("[W]e doubt that the acts of even a state official, taken in violation of a nation's fundamental law and wholly unratified by that nation's government, could properly be characterized as an act of state."); *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1472 (9th Cir. 1994).

torture and murder. But that would be because the Political Branches made the judgment to permit such suits. The Constitution assigns them, and not former foreign officials like petitioner, the task of defining the law of nations and assessing the foreign-relations and diplomatic repercussions of Acts of Congress. *See Boos v. Barry*, 485 U.S. 312, 323-324 (1988) (Constitution charges Congress with deciding what measures are needed to protect diplomats and to promote diplomatic relations).

Here, the Political Branches have concluded that the law of nations supports holding former foreign officials who choose to come to the United States accountable – not immunized – for their acts of torture. 28 U.S.C. § 1350 note; S. Rep. No. 249, *supra*, at 7-8. While the TVPA was pending before Congress, the Reagan Administration expressed the United States' view that "torture, like hijacking, sabotage, hostage-taking, and attacks on internationally protected persons, is an offense of special international concern, and should have similarly broad, universal recognition as a crime against humanity, with appropriate jurisdictional consequences," including being held responsible "by any State in which the alleged offender is found." *Message from the President of the United States Transmitting the Convention Against Torture*, S. Treaty Doc. No. 100-20, at 9 (1988); *see Sosa*, 542 U.S. at 762 (Breyer, J., concurring) (international law reflects "procedural agreement that universal jurisdiction exists to prosecute" certain crimes, including torture).

Congress stressed, in particular, that enforcing liability would promote the United States' national

security, diplomatic, and international interests both by warning those who would torture or murder American soldiers, diplomats, and prisoners of war that they will be held accountable. *See* 137 Cong. Rec. S1378-1379 (daily ed. Jan. 31, 1991) (Sen. Specter). The TVPA also deters those who commit torture, rape, and murder from coming to the United States in the first place, given the foreign-relations problems their presence can cause. *See ibid.* (law will "serve notice * * * that the United States will not shelter human rights violators."); S. Rep. No. 249, *supra*, at 3 ("[T]orturers and death squads will no longer have a safe haven in the United States").

Petitioner's second-guessing of that judgment "belongs in the halls of Congress," *Powerex Corp. v. Reliant Energy Servs.*, 551 U.S. 224, 237 (2007), not here, because "[t]he judiciary is not well-positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions," *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999). Importantly, the Executive Branch concurs with respondents that the FSIA does not extend its immunity to foreign officials. U.S. Amicus Br., *Federal Ins. Co., supra.* "[C]ourts ought to be especially wary of overriding apparent statutory text supported by executive interpretation in favor of speculation" about a law's impact on the "vast external realm" of foreign affairs. *Republic of Iraq v. Beaty*, 129 S. Ct. 2183, 2191 (2009).[22]

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[22] Petitioner's concern about lawsuits against United States officials is misplaced because the laws to which he refers permitted suits against the "United States" (Pet. Br. 39), not its

While petitioner and his amici protest that permitting suit will chill foreign officials' decisionmaking, "'[f]oreign sovereign immunity' is not about 'chilling' or not chilling 'foreign states or their instrumentalities in the conduct of their business.'" *Altmann*, 541 U.S. at 709 (Breyer, J., concurring) (quoting *Dole*, 538 U.S. at 479). Instead, foreign sovereign immunity in the FSIA "reflects current political realities and relationships, and aims to give foreign states and their instrumentalities some *present* 'protection from the inconvenience of suit as a gesture of comity.'" *Altmann*, 541 U.S. at 696 (quoting *Dole*, 538 U.S. at 479).[23]

Furthermore, "actual reliance" on FSIA immunity by foreign officials in the course of their decisionmaking "could not possibly exist in fact." *Altmann*, 541 U.S. at 710 (Breyer, J., concurring). Surely petitioner cannot claim that he superintended the torture, rape, and killing of plaintiffs and their family members in specific reliance on FSIA immunity. Nor could reasonable reliance exist as a matter of law, because "foreign sovereign immunity 'reflects current political realities and relationships,' and its availability (or lack thereof) generally is not

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officials, and the litigation he cites involves *criminal* prosecutions by foreign governments, not civil litigation (Pet. Br. 39-40). Moreover, exhaustion requirements would prevent civil suits abroad for acts committed in nations that, like the United States, provide a fair and stable domestic judicial system. *See Sosa*, 542 U.S. at 733 & n.21; *id.* at 761 (Breyer, J., concurring).

[23] *See also In re Doe*, 860 F.2d 40 (2d Cir. 1988) (absolute immunity for heads of state ends upon leaving office).

something on which parties can rely in shaping their primary conduct." *Beaty*, 129 S. Ct. at 2194 (quoting *Altmann*, 541 U.S. at 696).

In any event, the TVPA and the Alien Tort Statute authorize the application of U.S. law only to those officials, like petitioner, who have chosen to come to the United States. Thus, at most, federal law would chill foreign officials not in the making of legitimate governmental decisions, but in making their vacation or residency plans. And that is precisely the deterrence that Congress wanted in the TVPA. *See, e.g.*, S. Rep. No. 249, *supra*, at 3.

Finally, petitioner professes concern (Br. 34) that the FSIA is the only thing standing between United States courts and a flood of litigation against foreign officials. The reality is otherwise. There has been no such flood in the two decades since the TVPA was enacted, nor could there be given the continued existence of longstanding specialized immunities for foreign officials. *See Matar v Dichter*, 563 F.3d 9, 13 (2d Cir. 2009) ("If (as may be) the FSIA does not apply to former foreign officials, it does not follow that these officials lack immunity."). And there are other substantial barriers to such suits, including (i) the requirement that the individual official establish sufficient contacts with the United States to permit personal jurisdiction, *Altmann*, 541 U.S. at 713 (Breyer, J., concurring); (ii) the express exhaustion requirement in the TVPA, 28 U.S.C. 1350 note, § 2(b), and perhaps in the Alien Tort Statute, *see Sosa*, 542 U.S. at 733 & n.21; (iii) the *forum non conveniens* doctrine; (iv) dismissals compelled by inability to join an indispensable party, *see Pimentel*, 128 S. Ct. at 2194; (v) the political question doctrine

and "case-specific deference to the political branches," *Sosa*, 542 U.S. at 733 n.21; *see Altmann*, 541 U.S. at 714 (Breyer, J., concurring); (vi) the act of state doctrine; (vii) the requirement that plaintiffs show their entitlement to relief, *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); and (viii) the substantive limitations placed on causes of action, such as the TVPA's limitation to torture and extrajudicial killing, and the Alien Tort Statute's limitation to "a handful of" "universal" norms with such "definite content" that they give rise to a federal common law cause of action under *Sosa*, 542 U.S. at 714, 732. *See also* Anti-Defamation League Amicus Br. 10-24.

In short, it is up to the Political Branches to define the immunity (if any) accorded foreign officials by the law of nations and to assess the foreign policy consequences of allowing causes of actions against them. In this case, the Political Branches have expressly determined that holding torturers within the jurisdiction of U.S. courts accountable for actions taken under color of official authority is consistent with both international law and the United States' foreign-policy interests. Because "[s]uch decisions are wholly confided by our Constitution to the political departments of the government," the "Judiciary has neither aptitude, facilities nor responsibility" to re-define the law of nations as immunizing the very actions for which the Political Branches created liability and to graft a new body of individual immunity law onto FSIA text that will not support it. *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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ADDENDUM

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Art. I, § 8, cl. 10.

The Congress shall have Power * * * [t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.

THE FOREIGN SOVEREIGN IMMUNITIES ACT

28 U.S.C. § 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

28 U.S.C. § 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by

reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C. § 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United

States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made

pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(7) Repealed. Pub. L. 110-181, Div. A, § 1083(b)(1)(A)(iii), Jan. 28, 2008, 122 Stat. 341

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or

cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as

defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

(e), (f) Repealed. Pub.L. 110-181, Div. A, Title X, § 1083(b)(1)(B), Jan. 28, 2008, 122 Stat. 341

(g) Limitation on discovery.—

(1) In general.—(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for section 1605A, the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident

that gave rise to the cause of action.

(2) Sunset.—(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would—

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) Evaluation of evidence.—The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) Bar on motions to dismiss.—A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under

rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) Construction.—Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

28 U.S.C. § 1605A. Terrorism exception to the jurisdictional immunity of a foreign state

(a) In general.—

(1) No immunity.—A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

(2) Claim heard.—The court shall hear a claim under this section if—

(A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or

(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal

Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) was filed;

(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred—

(I) a national of the United States;

(II) a member of the armed forces; or

(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or

(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

(b) Limitations.—An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) not later than the latter of—

(1) 10 years after April 24, 1996; or

(2) 10 years after the date on which the cause of action arose.

(c) Private right of action.—A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to—

(1) a national of the United States,

(2) a member of the armed forces,

(3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or

(4) the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described

in subsection (a) (1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

(d) Additional damages.—After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

(e) Special masters.—

(1) In general.—The courts of the United States may appoint special masters to hear damage claims brought under this section.

(2) Transfer of funds.—The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph (1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

(f) Appeal.—In an action brought under this section, appeals from orders not conclusively ending the litigation may only be taken pursuant to section 1292(b) of this title.

(g) Property disposition.—

(1) In general.—In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the effect of establishing a lien of lis pendens upon any real property or tangible personal property that is—

(A) subject to attachment in aid of execution, or execution, under section 1610;

(B) located within that judicial district; and

(C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.

(2) Notice.—A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

(3) Enforceability.—Liens established by reason

of this subsection shall be enforceable as provided in chapter 111 of this title.

(h) Definitions.—For purposes of this section—

(1) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages;

(3) the term "material support or resources" has the meaning given that term in section 2339A of title 18;

(4) the term "armed forces" has the meaning given that term in section 101 of title 10;

(5) the term "national of the United States" has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

(6) the term "state sponsor of terrorism" means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international

terrorism; and

(7) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).

28 U.S.C. § 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

28 U.S.C. § 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—

(a) for which a foreign state would not be entitled to immunity under section 1605 or 1605A of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

28 U.S.C. § 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the

attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made—

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless

the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

28 U.S.C. § 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

28 U.S.C. § 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property—

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the

United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605A, regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the

agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a) (2), (3), or (5), 1605(b), or 1605A of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if—

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may

ultimately be entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

(f)(1)(A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A.

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized by the foreign state, the property has been held in title by a natural person or, if held in trust, has been held for the benefit of a natural person or persons.

(2)(A) At the request of any party in whose favor a

judgment has been issued with respect to a claim for which the foreign state is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A, the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

(B) In providing such assistance, the Secretaries—

(i) may provide such information to the court under seal; and

(ii) should make every effort to provide the information in a manner sufficient to allow the court to direct the United States Marshall's office to promptly and effectively execute against that property.

(3) Waiver.—The President may waive any provision of paragraph (1) in the interest of national security.

(g) Property in certain actions.—

(1) In general.—Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that

judgment as provided in this section, regardless of—

(A) the level of economic control over the property by the government of the foreign state;

(B) whether the profits of the property go to that government;

(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

(D) whether that government is the sole beneficiary in interest of the property; or

(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

(2) United States sovereign immunity inapplicable.—Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act.

(3) Third-party joint property holders.—Nothing in this subsection shall be construed to

supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.

28 U.S.C. § 1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(c) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.

28 U.S.C. § 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

ALIEN TORT STATUTE

28 U.S.C. § 1350. Alien's action for tort

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

TORTURE VICTIM PROTECTION ACT OF 1991, Pub. L. No. 102-256, 106 Stat. 73 (reproduced at 28 U.S.C. § 1350 note)

Section 1. Short Title.

This Act may be cited as the "Torture Victim Protection Act of 1991."

Sec. 2. Establishment of civil action.

(a) Liability.—An individual who, under actual or apparent authority, or color of law, of any foreign nation—

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

(b) Exhaustion of remedies.—A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

(c) Statute of limitations.—No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

Sec. 3. Definitions.

(a) Extrajudicial killing.—For the purposes of this Act, the term "extrajudicial killing" means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

(b) Torture.—For the purposes of this Act—

(1) the term "torture" means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from—

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality."

REPLY BRIEF

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IN THE

Supreme Court of the United States

MOHAMED ALI SAMANTAR,

Petitioner,

v.

BASHE ABDI YOUSUF ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF OF PETITIONER

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Respondents and the Solicitor General envision virtually unthinkable immunity regimes.

1. In Respondents' view, the FSIA would not govern any suit against a foreign official challenging acts undertaken on behalf of a foreign state. Respondents' argument extends even to core aspects of policymaking by present and former cabinet-level officials of close U.S. allies. *See, e.g., Belhas v. Ya'alon*, 515 F.3d 1279 (D.C. Cir. 2008) (suit against former Israeli general for alleged torture by military in Lebanon); *In re Terrorist Attacks on Sept. 11, 2001 (Fed. Ins. Co.)*, 538 F.3d 71 (2d Cir. 2008) (suit against Saudi officials). No former officials and few current officials who visit the United States for however short a time would be immune from a suit in which a jury would measure the lawfulness of a foreign state's internal policy according to U.S. law and U.S. conceptions of international law.

In Respondents' view, the only immunity backstop against such suits would be "specialized immunities," Resp. Br. 39-41, such as diplomatic, consular, and head-of-state immunity. Those "status" immunities, however, "appl[y] solely to limited categories of high ranking officials of the State," and only "while [they] serv[e] in office." Hazel Fox, *The Law of State Immunity* 666 (2d ed. 2008). But the FSIA codified the *act*-based foreign sovereign immunity that U.S. and international law recognized before the FSIA, that international law requires today, and that extends a state's immunity to suits against a broader array of current and former officials for their official acts. *See id.* at 666-67; Restatement (Second) of Foreign Relations Law of the United States § 66 (1965). Deference to the "Political Branches," which

Respondents urge, requires giving effect to that codification—not reading the FSIA as having silently overridden centuries of immunity law absent any indication in the Act's text, structure, or legislative history.

The United States would stand alone in the world if this Court adopted Respondents' evisceration of foreign sovereign immunity. As the House of Lords explained in holding Saudi officials immune from personal liability in a suit alleging torture, "international law" requires that "state immunity afford[] individual employees or officers of a foreign state 'protection under the same cloak as protects the state itself.'" *Jones v. Ministry of Interior of Saudi Arabia*, [2007] 1 A.C. 270, 298-99 (H.L. 2006) (appeal taken from C.A.) (U.K.) (Lord Hoffmann).

2. The Solicitor General's position—that even after the FSIA, "foreign officials' immunity continues to be governed by the generally applicable principles of immunity articulated by the Executive Branch," SG Br. 7—is equally untenable. Congress passed the FSIA—at the *request* of the Executive Branch—to codify comprehensively the law of foreign sovereign immunity, "to free the Government from the case-by-case diplomatic pressures" of making immunity suggestions to courts, "to clarify the governing standards," and "to 'assur[e] litigants that... [immunity] decisions are made on purely legal grounds and under procedures that insure due process.'" *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 487-88 (1983); *see also* Restatement (Third) of Foreign Relations Law of the United States, Introductory Note to Chapter 5, Subchapter A, at 393-94 (1987) (FSIA resulted from requests by "the

Department of State...to relieve the Department of the task of ruling on claims of sovereign immunity"); Letter from Richard G. Kleindienst, Att'y Gen., U.S. Dep't of Justice, and William P. Rogers, Sec'y, U.S. Dep't of State, to Speaker, House of Representatives (Jan. 16, 1973), *reprinted in Immunities of Foreign States: Hearing Before the H. Subcomm. on Claims and Governmental Relations of the Comm. on the Judiciary*, 93d Cong. 34 (1973) ("Plaintiffs, the Department of State, and foreign states would...benefit from the removal of the issue of immunity from the realm of discretion and making it a justiciable question."). Thus, the FSIA ensures *uniform* immunity determinations made "exclusively [by] the courts," "[i]n accordance with the practice in most other countries." Letter from Monroe Leigh, Legal Adviser, U.S. Dep't of State, to Edward H. Levi, Att'y Gen., U.S. Dep't of Justice (Nov. 2, 1976), *reprinted in* 75 Dep't St. Bull. 649 (1976); *see also Jones*, 1 A.C. at 291, 306 (immunity "is governed by the law, not by executive or judicial discretion," and must be applied "without any discrimination between one state and another") (Lords Bingham and Hoffmann). The Government's description of the multitude of factors it might take into account in an individual immunity determination, SG Br. 7, 25-26, exemplifies the inconsistent results Congress sought to eradicate.

3. The FSIA must "be read with a presumption favoring the retention of long-established and familiar [common-law] principles, except when a statutory purpose to the contrary is evident," *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952), and Congress "'speak[s] directly' to the question addressed by the common law." *United States v.*

Texas, 507 U.S. 529, 534 (1993). The FSIA contains no indication that Congress intended to abrogate the sovereign immunity of foreign officials, as urged by Respondents. Nor could Congress have intended to create a senseless, bifurcated regime plagued by the same problems that the FSIA was intended to end, as urged by the Government.[1]

Rather, a suit against a foreign official for official-capacity acts is in reality a suit against the state itself. It therefore falls within the purview of the FSIA, which immunizes "foreign state[s]" from suit in U.S. courts, subject to certain exceptions not applicable here. 28 U.S.C. §§ 1603-1607.

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[1] Contrary to the Government's assertion, the pre-FSIA common law did not recognize a settled, longstanding tradition of judicial deference to the Executive's immunity suggestions. *See, e.g., Berizzi Bros. Co. v. The Pesaro*, 271 U.S. 562, 574-76 (1926) (dismissing case on sovereign immunity grounds despite State Department's contrary suggestion, *see In re The Pesaro*, 277 F. 473, 479 n.3 (S.D.N.Y. 1921)); H.R. Rep. No. 94-1487, at 8 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6606 (noting that, only "[i]n the early part of this century, the Supreme Court began to place less emphasis on whether immunity was supported by the law and practice of nations, and relied instead on the practices and policies of the State Department"); Curtis A. Bradley & Jack L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 Mich. L. Rev. 2129, 2161-63 (1999).

ARGUMENT

I. THE FSIA SUPPORTS TREATING A SUIT AGAINST AN OFFICIAL FOR OFFICIAL-CAPACITY ACTS AS A SUIT AGAINST A FOREIGN STATE

Each of Respondents' arguments for finding the FSIA inapplicable to suits against foreign officials for their official acts is without merit.

1. The FSIA provides that a "'foreign state'...*includes* an agency or instrumentality of a foreign state," 28 U.S.C. § 1603(a) (emphasis added), strongly suggesting that a "foreign state" refers to more than just the identified examples and extends to other means through which the state acts, *i.e.*, its officials.

Respondents are wrong that the term "includes" introduces an exhaustive list of entities constituting a "foreign state." Resp. Br. 19-20. That Congress did not intend for "includes" to serve as a term of limitation is underscored by the contrast between providing what a foreign state "*includes*," 28 U.S.C. § 1603(a) (emphasis added), and defining in the very next subsection what an agency or instrumentality "*means*," *id.* § 1603(b) (emphasis added). Had Congress intended to define a "foreign state" comprehensively, it could have said a foreign state *means* the state itself and its political subdivisions, agencies, or instrumentalities. *See Boyle v. United States*, 129 S. Ct. 2237, 2243 n.2 (2009) (contrasting the terms "mean" and "include" under RICO) (emphasis omitted).

The Government does not suggest the entities listed are exhaustive (*see also* U.S. Br. as Amicus Curiae, *Ministry of Def. & Support for the Armed*

Forces of the Islamic Rep. of Iran (MOD) v. Elahi, No. 04-1095, 2005 WL 3477863, at *9 (Dec. 19, 2005) ("*Elahi* Br.")), but nevertheless argues that § 1603(b) excludes individual officials because the listed entities are non-natural and "'a word is given more precise content by the neighboring words with which it is associated.'" SG Br. 17-18. But the better application of that canon is that individual officials resemble the agencies and instrumentalities described in § 1603(b) because they are the means through which a state acts.

The reason Congress *expressly* mentioned governmental and corporate entities is that they "had previously—and problematically—been omitted from the term 'state.'" Resp. Br. 20; *see also* Joseph W. Dellapenna, *Suing Foreign Governments and Their Corporations* 65 (2d ed. 2003). Had Congress *not* defined a foreign state to include such corporate entities as agencies and instrumentalities, the FSIA may have been read to exclude them.

By contrast, there was no dispute that foreign officials were entitled to the sovereign immunity of a foreign state for their official-capacity acts. Congress therefore had no need to say expressly that the state's immunity would continue to extend to its officials. Indeed, the fact that the FSIA's legislative history is silent about the foreign sovereign immunity of officials, but mentions that diplomatic and consular immunity are outside the statute's scope, SG Br. 18-19, suggests Congress did *not* depart from the common law and separate the sovereign immunity of the state from that of its officials. *Cf. Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991)

(absence of reference to "'sweeping'" legal change in legislative history is "'watchdog [that] did not bark'").

2. Respondents also argue a state must "[m]ean[] a [p]olitical [b]ody" and "individual officials" therefore do not "constitute 'states' under the FSIA." Resp. Br. 13-15 (bolding removed); *see also* SG Br. 14-15.

The dictionary definition of a state is irrelevant because Petitioner does not argue that he *is* a foreign state, but rather that "a suit against a present or former official for official-capacity acts is in reality a suit against the 'foreign state' itself and therefore falls within the purview of the FSIA." Petr. Br. 17, 21-41; *see also Chuidian v. Phil. Nat'l Bank*, 912 F.2d 1095, 1101 (9th Cir. 1990); *Fed. Ins. Co.*, 538 F.3d at 84.

Moreover, the FSIA defines a "'foreign state'" to "include[]" *more* than just a "'body politic,'" Resp. Br. 13, to encompass the "agenc[ies] or instrumentalit[ies]" through which the state acts—entities that would fall outside the definition proposed by Respondents. 28 U.S.C. § 1603(a).

That definition would also lead to absurd results because it would exclude from the FSIA's scope a host of individuals and entities through which the "body politic" functions—such as defense ministries, armies, treasuries, and foreign affairs ministries. *See, e.g.*, *MOD v. Cubic Def. Sys., Inc.*, 495 F.3d 1024, 1035 (9th Cir. 2007), *rev'd on other grounds sub nom. MOD v. Elahi*, 129 S. Ct. 1732 (2009); *Garb v. Republic of Poland*, 440 F.3d 579, 589-90 (2d Cir. 2006); *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 234-35 (D.C. Cir. 2003); *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 153 (D.C. Cir. 1994). Indeed, the Government previously argued

the term "foreign state" extends to a "defense ministry, which...is presumptively inseparable from the foreign state itself." *Elahi* Br. at *9. An individual in his official-capacity acts is no less inseparable from the state.

3. Respondents argue it would render the separate references to foreign states and their officials in the FSIA's tort and terrorism exceptions "superfluous" if the term "foreign state" were construed to encompass suits against state officials. Resp. Br. 15-19 (discussing 28 U.S.C. §§ 1605(a)(5), 1605A(a)(1), 1605A(c)).[2]

But the fact that the FSIA mentions a foreign "state" separately from "officials" hardly suggests that a state's immunity does not extend to its officials. For example, although a foreign state's immunity extends to agencies or instrumentalities because the FSIA "includes" agencies or instrumentalities in the definition of a foreign state, 28 U.S.C. § 1603(a), the FSIA repeatedly refers *separately* to a "foreign state" and its "agenc[ies] or instrumentalit[ies]" when describing exceptions to

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[2] Respondents cite other statutes unrelated to immunity addressing the status of individual officials. But each statute mentioned individual officials to treat them differently from the state, or to treat one subset of officials differently from another. *See, e.g.*, 50 U.S.C. § 1801(a)-(b) (defining "'[f]oreign power'" and "'[a]gent of a foreign power'" separately because of different treatment accorded to each, *e.g.*, *id.* § 1805(d)(1)). Congress's silence about individual officials in the FSIA's definition of a "foreign state" suggests it did not similarly intend to differentiate between suits against a foreign state and suits against officials for their official acts.

the immunity of a foreign state's property from attachment. *See, e.g., id.* § 1610(f)(2)(A) ("property of [a] foreign state or any agency or instrumentality of such state"); *see also id.* § 1610(f)(1)(A); (g)(1); (g)(2).

Moreover, the FSIA's tort and terrorism exceptions are not describing what constitutes a foreign state or when a state's immunity extends to its officials; they are defining and delimiting *exceptions* to immunity. *See* Dellapenna, *supra*, at 324, 415-16. In doing so, the exceptions make clear when states can be sued under a respondeat superior theory of liability. There is nothing "'superfluous,'" Resp. Br. 15, about specifying the circumstances in which a foreign state is liable for officials' actions pursuant to a new exception abrogating hundreds of years of sovereign immunity. Such statutory exceptions *must* "speak directly" to the new rule being created. *Texas*, 507 U.S. at 534.

Congress legislates against the background principle that "[w]aivers of [sovereign] immunity must be 'construed strictly in favor of the sovereign' and not 'enlarge[d]...beyond what the language requires.'" *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-86 (1983) (citation omitted); *see also* Gregory C. Sisk, *Litigation with the Federal Government* 94-95 (4th ed. 2006) (Congress uses "'specifically targeted statutory language'" to waive sovereign immunity). Thus, in waiving the immunity of the United States, federal statutes routinely use language like that in the FSIA to describe the scope of the waiver. *See, e.g.*, 28 U.S.C. § 1346(b)(1) (waiving sovereign immunity when United States is sued for harm caused by "any employee of the Government while

acting within the scope of his office or employment"); *see also id.* § 2679(b)(1); 5 U.S.C. § 702; 7 U.S.C. § 2570, *abrogated by Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999).

This clarification answered numerous ambiguities that would have arisen had the FSIA simply revoked the immunity of a "state" for torts and terrorism, without mentioning "officials." For example, the language in the FSIA about the "scope of... employment," *see* 28 U.S.C. §§ 1605(a)(5); 1605A(a)(1), clarifies that a state may be liable even if an official is entitled to diplomatic or other status-based immunity. The same language may also waive the immunity of a foreign state for foreseeable actions by the state's officials even if those actions are inconsistent with the state's orders or do not reflect the state's official policies, and even if the state subsequently disclaims the actions. *See Joseph v. Office of Consulate Gen. of Nig.*, 830 F.2d 1018, 1025 (9th Cir. 1987).

In short, the FSIA exceptions' separate references to "state" and "officials" do not suggest, much less make "evident," *Isbrandtsen*, 343 U.S. at 783, that the FSIA ended the common law's protection of "officials" of the "state." The parallel treatment given to "officials" and their "state[s]" by the FSIA when immunity is taken away, if anything, further reinforces their unity of interest when the state's immunity continues.

4. Respondents are wrong that the FSIA precludes service of process on individuals. Resp. Br. 25-26; SG Br. 24. Officials may be served in accordance with the FSIA's procedures for service on

a foreign state, 28 U.S.C. § 1608(a). *See Baumel v. Syrian Arab Republic*, 550 F. Supp. 2d 110, 113-14 (D.D.C. 2008); *Gates v. Syrian Arab Republic*, 580 F. Supp. 2d 53, 64 (D.D.C. 2008); *Nikbin v. Islamic Republic of Iran*, 471 F. Supp. 2d 53, 67-69 (D.D.C. 2007).

The FSIA permits service based upon "any special arrangement" between the plaintiff and the foreign state or agency or instrumentality, 28 U.S.C. § 1608(a)(1), (b)(1); by directing the summons and complaint "to the head of the ministry of foreign affairs of the foreign state," *id.* § 1608(a)(3); and pursuant to "an applicable international convention on service of judicial documents," *id.* § 1608(a)(2), (b)(2). In turn, the Hague Service Convention, which the United States has ratified, *see* Dellapenna, *supra*, at 278, permits service pursuant to the laws of the forum state, including the Federal Rules of Civil Procedure, if the defendant is found in the United States. *See* 1 James Wm. Moore et al., *Moore's Federal Practice* § 4.52[2][a] (3d ed. 2009).

5. Respondents profess concern that applying the FSIA to individuals would expose them to personal liability for the state's terrorist acts or commercial activities. Resp. Br. 26-27. As to the former, because 28 U.S.C. § 1605A authorizes a cause of action against certain officials for terrorist acts, their personal property should be available to satisfy such judgments. As to the latter, only the state, not its agents, would ordinarily be responsible for any judgment under agency principles. *See* Working Group of the ABA, *Reforming the Sovereign*

Immunities Act, 40 Colum. J. Transnat'l L. 489, 539 & n.170 (2002).[3]

II. RESPONDENTS' RELIANCE ON NON-FSIA SOURCES OF LAW DOES NOT NEGATE THE SOVEREIGN IMMUNITY OF FOREIGN OFFICIALS

Unaided by the FSIA's text or structure, Respondents turn to other sources of law, none of which establish that the FSIA excluded officials from the scope of a foreign state's immunity.

A. RESPONDENTS' RELIANCE ON DOMESTIC IMMUNITY CASES CONTRAVENES THE FOREIGN SOVEREIGN IMMUNITY PRINCIPLE THAT ONE STATE CANNOT JUDGE ANOTHER STATE'S ACTS

Respondents mistakenly rely on domestic immunity cases to argue that foreign sovereign immunity turns on whether the court's judgment would operate directly against the state, so that actions for the official's personal money purportedly raise no concerns. Resp. Br. 38. Such a rule has no basis in the law of foreign sovereign immunity.

Under domestic immunity cases, as Respondents cogently explain, "a suit for personal money damages from an official does not constitute a suit against the

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[3] Respondents' Due Process concerns about extending the FSIA to individuals, Resp. Br. 27-28, are misplaced because Congress ensured minimum contacts would be satisfied in any suit allowed to proceed under the FSIA "by enacting substantive [exceptions to immunity] requiring some form of substantial contact with the United States." *Verlinden*, 461 U.S. at 490.

state" only where the official's "actions exceeded limits on his authority imposed by *controlling law*," in which case "'[t]he officer is *not* doing the business which the *sovereign has empowered him* to do or he is doing it in a way which the sovereign has forbidden.'" Resp. Br. 38 (quoting *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949)) (emphasis added). Thus, an essential prerequisite to such a suit is finding that an official is *not* acting for the sovereign because his actions violate the sovereign's "controlling law."

But such a determination is precisely what foreign sovereign immunity *prohibits*. While federal courts may determine when an official's acts exceed *our* "controlling law," they have no basis for saying that a foreign official's actions violate *foreign* law, and that he therefore must not be acting for his state. U.S. courts are not ultimate arbiters of "controlling law" for other nations or of international law. Indeed, the fundamental premise of foreign sovereign immunity is that one nation may not judge the acts of another. *See Heaney v. Government of Spain*, 445 F.2d 501, 503 (2d Cir. 1971); *Underhill v. Hernandez*, 65 F. 577, 579 (2d Cir. 1895). Thus, unlike domestic immunity, federal courts cannot say an official's acts violate "controlling law" of a foreign state without gravely interfering with the international comity underlying foreign sovereign immunity.

Moreover, it is one thing for U.S. courts to "balanc[e]...'fundamentally antagonistic social policies,'" *United States v. Stanley*, 483 U.S. 669, 695 n.13 (1987) (Brennan, J., concurring in part and dissenting in part), by permitting damages actions that subject *domestic* officials "to 'the supreme

authority of the United States.'" *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984). But U.S. courts have no role "in identifying and resolving these social tradeoffs for other countries...[because] [f]oreign nations have different legal and political cultures, different attitudes toward spreading risk through civil damages, and different degrees of wealth (and thus different capacities to pay civil damages)," whether those damages come from states or individuals. Curtis A. Bradley & Jack L. Goldsmith, *Foreign Sovereign Immunity and Domestic Officer Suits*, 13 Green Bag 2d 137, 148 (2010).

In short, none of the reasons for distinguishing between damages suits against domestic officials and suits against the state apply in the foreign context, and such a distinction undermines all the policies shielding foreign states from suit. As the Government correctly notes, "personal damage actions against foreign officials can unduly chill their performance of duties, trigger reciprocity concerns about the treatment of United States officials sued in foreign courts, and interfere with the Executive Branch's conduct of foreign affairs" just as much as actions brought directly against a foreign state. SG Br. 22.

For these and other reasons, the common law has long distinguished between cases against domestic officials, who may be held personally liable in certain circumstances, and cases against foreign officials,

who are absolutely immune from suit for their official acts. *See* Bradley & Goldsmith, *supra*, at 137-44.[4]

B. FOREIGN SOVEREIGN IMMUNITY DOES NOT TURN ON WHETHER THE JUDGMENT WOULD BE PAID BY THE STATE

For the reasons just stated, the common law of foreign sovereign immunity, contrary to Respondents' assertion, draws no distinction between suits seeking a judgment against the state and those seeking money from the official, but immunizes *all* official acts on the state's behalf. Actions taken in an official capacity simply "cannot form the basis for a suit against [a foreign official] personally." Statement of Interest of the United States, *Matar v. Dichter*, No. 05 Civ. 10270 (WHP), at 26 (S.D.N.Y. Nov. 17, 2006).

As the Government notes, pre-FSIA common law "recognized the immunity of individual foreign officials 'from suits brought in [United States]

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[4] *Velasco v. Government of Indonesia*, 370 F.3d 392, 399 (4th Cir. 2004), and *Lyders v. Lund*, 32 F.2d 308, 309 (N.D. Cal. 1929), on which Respondents rely, are not to the contrary. Resp. Br. 47 & n 17. *See Velasco*, 370 F.3d at 398-99 (officer's entitlement to immunity turns on the official nature of his acts); *Lyders*, 32 F.2d at 310 (denial of immunity turned on the absence of evidence regarding the official nature of the act in question). Nor does the Restatement (Third) of Foreign Relations § 907 comment c instruct U.S. courts to apply domestic immunity principles in suits against foreign officials. Resp. Br. 47-48. To the contrary: "Suits [alleging violations of international law] against a foreign state are subject to the defense of [foreign] sovereign immunity [while] [s]uits *against the United States* are subject to the domestic counterpart of that doctrine . . . ." *Id.* (emphasis added and citation omitted).

tribunals for acts done within their own States, in the exercise of governmental authority.'" SG Br. 10. This immunity "was traditionally not limited to current employees of the foreign government." SG Br. 11. Extending sovereign immunity to current and former officials is "consistent with customary international law," *id.*, and "serves the important purposes of protecting the reciprocal interests of sovereigns, ensuring that officials are not unduly chilled in the performance of their duties, and preventing litigants from circumventing the FSIA's stringent limitations on suit against the state through suits against its former officials," *id.* at 29.

The "immunity of foreign officials" does not turn on whether the state would respond directly to a judgment, but "arises from the official character of their acts," which "'are those of the state itself.'" *Id.* at 11-12 (quoting *Underhill*, 65 F. at 579). As the Government explains, "personal damage suits against foreign officials based on actions taken in their official capacity may require the court to sit in judgment of a foreign state's actions, much as in a suit against the state itself." *Id.* at 12-13; *see also Jones*, 1 A.C. at 281 (Lord Bingham); *Jaffe v. Miller*, [1993] 13 O.R.3d 745, 758-59 (C.A.), *leave to appeal refused*, [1994] 1 S.C.R. viii (note) (Canada). [5]

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[5] The Government asserts that foreign officials may sometimes be entitled to either more or less immunity than foreign states themselves. But the Government cannot cite a single instance where an official has been accorded less immunity, and the only case purportedly giving officials broader immunity, *Greenspan v. Crosbie*, No. 74 Civ. 4734 (GLG), 1976 WL 841 (S.D.N.Y. Nov. 23, 1976), involved allegations against officials only for official acts, while the allegations against the

Moreover, as a practical matter, the prospect of bankrupting a foreign official for official acts has at least as much effect on the individual's conduct as relief against the state. *See Riegel v. Medtronic, Inc.*, 552 U.S. 312, 324 (2008) ("damages" are "a potent method of governing conduct") (internal quotation marks omitted).

Respondents nevertheless insist the touchstone of foreign sovereign immunity is whether a judgment runs against a foreign state. Their own interpretation of the FSIA contravenes even *this* erroneous understanding of foreign sovereign immunity law because, in their view, the statute would *never* immunize individuals from suit, even in an injunctive action running against the state. Regardless, Respondents cannot cite a single authority deviating from the settled rule that foreign officials' entitlement to sovereign immunity turns on the official character of their acts.

1. *Restatement (Second) of Foreign Relations*

Respondents argue that under the Restatement (Second) of Foreign Relations, foreign sovereign immunity turns on the "compulsive effect of the *judgment* on the state," Resp. Br. 42 (emphasis added), because the Restatement immunizes officials only "if the effect of exercising jurisdiction would be to enforce a *rule of law* against the state." Restatement (Second) of Foreign Relations § 66(f)

(continued...)

state involved both official and commercial acts. *See* State Territory, Jurisdiction, and Jurisdictional Immunities, 1976 Digest § 7, at 329-30.

(emphasis added). But obviously a court can enforce a *rule of law* against a foreign state without enforcing a *judgment* against it. *Cf. Baker ex rel. Thomas v. Gen. Motors Corp.*, 522 U.S. 222, 232-33 (1998) (differentiating between enforcing laws and enforcing judgments under Full Faith and Credit Clause). The "'effect of exercising jurisdiction would be to enforce a rule of law against the state'" where the lawsuit would require the court to sit in judgment "of the propriety of [the state's] political conduct" because the challenged acts of the official are "those of the sovereign itself." *Heaney*, 445 F.2d at 504 (quoting Restatement (Second) of Foreign Relations § 66(f)).

The Restatement's illustrations confirm this understanding. A foreign official would not be immunized for injuries caused by an automobile accident in the forum state, Restatement (Second) § 66, ill. 3, because "use of public roads" by a foreign official "belong[s] to the sphere of...*private* activities" unrelated to state policy, even if "such operation and use have occurred in the performance of official functions." *Collision with Foreign Gov't-Owned Motor Car Case*, 40 I.L.R. 73, 78 (Austria Sup. Ct. 1961). By contrast, truly official acts *are* immunized, regardless of the relief sought. *Compare* Restatement (Second) § 66, ill. 2 (defense ministry official would be entitled to immunity in breach-of-contract case involving supplies purchased for armed forces), *with Grunfeld v. United States* (N.S.W. Sup. Ct. 1968) (Australia) (officer who bought supplies for the military was entitled to sovereign immunity in breach-of-contract action because he acted "for the purposes of the foreign state itself"), *excerpted in* 20 *U.N. Legislative Series, Materials on Jurisdictional Immunities of States and Their Property*, at 181-83

U.N. Doc. ST/LEG/SER.B/20, U.N. Sales No. E/F.81.V.10 (William S. Hein & Co., photo. reprint 2003) (1982) [hereinafter *Materials*].

Finally, the Restatement (Third), which was issued after enactment of the FSIA, deleted "'in its entirety the discussion of the United States common law of sovereign immunity, and substitute[d] a section analyzing issues exclusively under the [FSIA].'" *Fed. Ins. Co.*, 538 F.3d at 83. It therefore confirms the FSIA governs the sovereign immunity of foreign officials. *Id.*

2. *Foreign Sovereign Immunity Cases*

Respondents' reliance on foreign sovereign immunity cases fares no better.

a. Contrary to Respondents' assertions, none of the cases cited in Petitioner's brief turned on the alleged coercive effect of the judgment on the state. In some cases, the fact that a judgment ran against the state *reinforced* the conclusion that the lawsuit challenged official state action. But the touchstone in each case was the official nature of the act. *See Church of Scientology Case*, 65 I.L.R. 193, 197 (Fed. Sup. Ct. 1978) (Germany) ("The nature of the particular State act to be judged is the decisive factor."); *Grunfeld, excerpted in Materials*, at 183 (Officer "did not act in a personal capacity, and it is clear that what was done...was done for the purposes of the foreign state itself."); *Syquia v. Almeda Lopez, excerpted in Materials*, at 360, 363 (Phil. Sup. Ct. 1949) (Officers could not be held "personally liable" for damages because [they] were acting "pursuant to orders received from that Government."); *Heaney*, 445 F.2d at 503 (Officer was entitled to sovereign immunity because the "act here in question...[is]

'strictly political or public.'"); *Oliner v. Can. Pac. Ry. Co.*, 311 N.Y.S.2d 429, 434 (App. Div. 1970) ("[T]he action [in question] was an act of state" and therefore the officer is "entitled to sovereign immunity."); *Bradford v. Dir. Gen. R.R.s of Mex.*, 278 S.W. 251, 252 (Tex. Civ. App. 1925) (dismissing suit because the action required the court to question "'an act done by a sovereign in his sovereign character'").

b. Respondents' attempt to distinguish other cases as not involving sovereign immunity are belied by the courts' opinions. *See Holland v. Lampen-Wolfe*, [2000] 1 W.L.R. 1573, 1578 (H.L.) (U.K.) (Lord Cooke) (agreeing that defendant is entitled to "sovereign immunity"); *id.* at 1588 (Lord Millett) (explaining the "immunity in question in the present case belongs to the United States"); *Jaffe*, 13 O.R.3d at 766 (explaining officers were "entitled to sovereign immunity"). And, while *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) and *Hatch v. Baez*, 14 N.Y. Sup. Ct. 596, 600 (1876), also applied the act of state doctrine, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 430-31 (1964), reiterated that "sovereign immunity provided an independent ground" (in addition to the act of state doctrine) for this Court's affirmance in *Underhill*, 168 U.S. 250, and at the time these cases were decided, the act of state doctrine was "linked with principles of sovereign immunity" in any event. *Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 757 F.2d 516, 520 (2d Cir. 1985).

c. As Respondents apparently concede, Resp. Br. 44, *Jones v. Ministry of Interior of Saudi Arabia* holds that sovereign immunity extends to suits against officers acting in their official capacity,

regardless of whether the plaintiff seeks damages from the state or the officer. 1 A.C. 270. Contrary to the misrepresentations by amici, *Jones* clearly holds that "*international law*" imposes a duty to recognize the immunity of officers accused of committing torture while acting in an official capacity, and that a state may not, "as a matter of discretion, relax or abandon" this immunity. 1 A.C. at 305-06 (emphasis added); *see also id.* at 278, 281-83, 288, 290-91, 293, 296-302 (Lords Bingham and Hoffmann).

d. The authorities cited by amici Public International Law Professors confirm that entitlement to immunity turns on the official nature of the act in question. In *Cole v. Heidtman* (S.D.N.Y. 1968), the State Department recommended the denial of sovereign immunity to both the foreign agency and its official because the acts were "'of a *private* nature under the standards set forth in the Tate Letter.'" 1977 Digest app. at 1063 (emphasis added). In *Schmidt v. Home Secretary of the Government of the United Kingdom*, 103 I.L.R. 322, 325 (H. Ct. 1994), *aff'd*, [1997] 2 I.R. 121 (S.C.), the Irish High Court held that foreign officials are immune from tort claims challenging their official actions, and that *Saorstat & Continental Steamship Co. v. De Las Morenas*, 12 I.L.R. 97, 98 (S.C. 1944) (Ireland), on which amici rely, was not to the contrary. And in *Pilger v. United States Steel Corp.*, the British government "voluntarily strip[ped the officer] of...sovereign immunity" through legislation. 3 I.L.R. 181 (N.J. Ch. 1925).

C. THE TVPA DOES NOT CREATE AN EXCEPTION TO FOREIGN SOVEREIGN IMMUNITY

Respondents and their amici suggest the Torture Victim Protection Act (TVPA) creates an exception to immunity. Because the Fourth Circuit did not reach this question, *see* Pet. App. 11a n.3, it is not properly before this Court. In any event, the TVPA reinforces the conclusion that the FSIA ordinarily bars suits against individual officials for their official-capacity acts.

Respondents' argument that the TVPA should be read *in pari materia* with the FSIA, Resp. Br. 28, ignores that merely creating a cause of action does not waive preexisting immunity. *See, e.g., Dellmuth v. Muth*, 491 U.S. 223, 231 (1989) (enactment of new law where state officials are the only potential defendants does not waive the officials' Eleventh Amendment immunity). As the Government has explained, because the TVPA is "silent as to...the immunities of foreign officials," "it must be read in harmony with relevant immunity rules," U.S. Br. as Amicus Curiae, *Matar v. Dichter*, No. 07-2579-cv, at 26 (2d Cir. Dec. 19, 2007), "'rather than in derogation of them,'" *Malley v. Briggs*, 475 U.S. 335, 339 (1986). This is particularly true because Congress appended the TVPA to the Alien Tort Statute, which this Court held in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989), is subject to all provisions in the FSIA, including the FSIA's *exclusive* exceptions to immunity. *See Belhas*, 515 F.3d at 1289. By contrast, when Congress wanted to waive FSIA immunity for certain acts by state

sponsors of terrorism, it amended the *FSIA* to create an exception to immunity. *Id.*

The TVPA's legislative history confirms that TVPA claims are "subject to restrictions in the" FSIA. H.R. Rep. No. 102-367(I), at 5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 88; *see also* S. Rep. No. 102-249, at 7 (1991) ("[T]he TVPA is not meant to override the [FSIA]."). As the Government explains, when Congress passed the TVPA, both the House and Senate Committees "assume[d], consistent with the Ninth Circuit's then-recent decision in *Chuidian*... that the FSIA would govern the determination of immunity for...foreign officials while in office and for all former foreign officials." SG Br. 20 (citing TVPA House & Senate Reports). Indeed, the Senate Report explained Congress's understanding that an official could "avoid liability by invoking the FSIA" if he could "prove an agency relationship to a state, which would require that the state 'admit some knowledge or authorization of relevant acts.'" S. Rep. No. 102-249, at 8; *see also* 138 Cong. Rec. S2668 (daily ed. Mar. 3, 1992) (statement of Sen. Specter) ("If an agency relationship with the foreign state can be proved...then the FSIA would operate to bar the suit [against the official].").

Seven months later, Congress again demonstrated its understanding that the FSIA applied to claims against individuals for their official acts. The Antiterrorism Act creates a remedy for terrorist acts, but bars claims against "a foreign state...*or an officer or employee of a foreign state...acting within his or her official capacity or under color of legal authority*." 18 U.S.C. § 2337(2) (emphasis added). The legislative history explains this restriction

"maintains the status quo, in accordance with the Foreign Sovereign Immunities Act, with respect to sovereign states *and their officials*." S. Rep. No. 102-342, at 47 (1992); H.R. Rep. No. 102-1040, at 7 (1992) (emphasis added).

Respondents erroneously conflate liability and immunity in arguing Congress used the terms "'actual or apparent authority'" and "'under color of law'" in the TVPA to invoke domestic-immunity cases permitting personal-capacity suits against government officials. Resp. Br. 28. Under 42 U.S.C. § 1983, this language concerns the circumstances in which an individual's actions are sufficiently tied to the state to create *liability*. *See Hafer v. Melo*, 502 U.S. 21, 28 (1991); *see also West v. Atkins*, 487 U.S. 42, 52 n.10 (1988) (even private parties may act under color of law if acting under state direction). An official's entitlement to *immunity*, by contrast, is "'predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it.'" *Hafer*, 502 U.S. at 28-29.

Nor would subjecting TVPA claims to the FSIA nullify the TVPA. Resp. Br. 30. TVPA claims could still be brought, for instance, if the foreign state disclaims the official's actions, *see, e.g.*, *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1472 (9th Cir. 1994); *Doe I v. Liu Qi*, 349 F. Supp. 2d 1258, 1285-87 (N.D. Cal. 2004); if the terrorism exception applies to the claim, 28 U.S.C. § 1605A(a)(1), *see, e.g.*, *Price v. Socialist People's Libyan Arab Jamahiriya*, 389 F.3d 192, 200 (D.C. Cir. 2004); or if the claim falls within another FSIA exception, such as those for commercial activities or non-commercial torts, *see, e.g.*, *Kalasho*

v. Republic of Iraq, No. 06-11030, 2007 WL 2683553, at *6-7 (E.D. Mich. 2007) (magistrate's report rejected in part on other grounds), or implicit or explicit waiver of immunity by the state, 28 U.S.C. § 1605(a)(1), *see, e.g., Paul v. Avril*, 812 F. Supp. 207, 210-11 (S.D. Fla. 1993).

Finally, that Congress understood that head-of-state and diplomatic immunity would not shield former officials from liability under the TVPA, Resp. Br. 29-30, is hardly surprising, because such *status-based* immunities generally lapse when an official leaves office. The act-based *sovereign* immunity that the FSIA codified does not. *See supra* p.1.

III. RESPONDENTS AND THEIR AMICI ADVANCE A SERIES OF ARGUMENTS NOT PROPERLY BEFORE THIS COURT

Respondents and their amici argue the actions allegedly taken by Petitioner could not have been official-capacity acts and that torture is a *jus cogens* violation for which no state or official may claim immunity. The Fourth Circuit did not reach these arguments, and they are not properly before this Court. Pet. App. 11a n.3; Resp. Br. 51 n.19; SG Br. 8, 31. They are also meritless.

1. Respondents' claims involve actions allegedly undertaken by Petitioner in his capacity as a former Defense Minister, First Vice President, and Prime Minister. JA 55-98 ¶¶ 2, 5-7, 95, 104, 114, 124, 134, 143, 152. The "[e]xercise of the powers of police and penal officers.... 'cannot be performed by an individual acting in his own name,'" but rather "'can be performed only by the state acting as such.'" *Saudi Arabia v. Nelson*, 507 U.S. 349, 362 (1993). Thus, under the FSIA, the alleged "abuse of the

power of [the] police" or military of a foreign state, "however monstrous such abuse undoubtedly may be," has "long been understood...as peculiarly sovereign in nature." *Id.* at 361; *see also Herbage v. Meese*, 747 F. Supp. 60, 67 (D.D.C. 1990) (FSIA bars claims for personal liability, "no matter how heinous the alleged illegalities," where "allegations would require an adjudication of the propriety and legality of the acts of British authorities in the performance of their official duties"), *cited by Nelson*, 507 U.S. at 361. This is particularly true when the foreign state characterizes the actions as official. *See, e.g., Belhas*, 515 F.3d at 1284.

Here, Respondents themselves claim Petitioner was implementing the policies of the regime he represented, and the Somali TFG[6] has reaffirmed Petitioner would have taken the alleged acts in his official capacity on behalf of Somalia—a foreign state that is a member of the United Nations, that the United States recognizes, and with which the United States has never severed diplomatic ties. Petr. Br. 8-9; Somali Professors Br. 30.

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[6] Respondents' arguments that the TFG does not reflect the views of the State of Somalia are belied by the extensive ties between the United States and the TFG, *see* Petr. Br. 8-9, and by the United States' recognition that the TFG speaks for Somalia for other purposes. For example, the United States drafted and co-sponsored U.N. Resolution 1851, which recognized that only the TFG could consent to allow other countries to interdict and prosecute pirates in Somalia's territorial waters. *See* S.C. Res. 1851, ¶¶ 3, 10, UN Doc. S/RES/1851 (Dec. 16, 2008). In any event, ratification by a current government provides only one indication that an individual's conduct was undertaken on behalf of a state. *See Chuidian*, 912 F.2d at 1106-07.

Contrary to Respondents' argument, Resp. Br. 51-53, sovereign immunity also applies to actions that allegedly violate domestic or international law. *See Belhas*, 515 F.3d at 1286-88; *Herbage*, 747 F. Supp. at 66-67. "[T]o condition a foreign sovereign's immunity on the outcome of a preliminary judicial evaluation of the propriety of its political conduct...would frustrate the very purpose of [foreign sovereign immunity]." *Heaney*, 445 F.2d at 504.

2. This Court cannot recognize a *jus cogens* exception to sovereign immunity for claims of torture because the exceptions to immunity in the FSIA are *exclusive*. *See Amerada Hess*, 488 U.S. at 435-36. And the FSIA exception for torture suits is limited to designated state sponsors of terrorism, 28 U.S.C. § 1605A, which Somalia is not.[7]

Nor does international law permit such an exception to immunity. *See, e.g., Jones*, 1 A.C. at 298 (Lord Hoffmann); *Bouzari v. Islamic Republic of Iran*, [2004] 71 O.R.3d 675, 695 (C.A.) (Canada). The Convention Against Torture (CAT), on which Respondents rely, "requires a State party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State," not for alleged torture abroad. *Status of the CAT*, at 21, UN Doc. CAT/C/2/Rev.5 (Jan. 22,

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[7] Nor does a state "waive[] its [FSIA] immunity either explicitly or by implication," 28 U.S.C. § 1605(a)(1), when it engages in torture. A state waives its immunity under § 1605(a)(1) only if it takes affirmative steps to submit to U.S. jurisdiction, which neither Petitioner nor Somalia has done here. *See, e.g., Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1173-74 (D.C. Cir. 1994).

1998); 136 Cong. Rec. S17486-01 (daily ed. Oct. 27, 1990); *see also Jones*, 1 A.C. at 296 (Lord Hoffmann). And, while parties to the CAT have agreed to *criminal* jurisdiction over extraterritorial torture in certain circumstances, under international law sovereign immunity still applies in *civil* cases. *See Jones*, 1 A.C. at 286-87, 289-91, 293, 296-306; *Bouzari*, 71 O.R.3d at 691-96. Such private litigation over torture claims, to which states have not consented, lacks the prosecutorial safeguards and state-to-state direct accountability of a criminal proceeding initiated by the government. Curtis A. Bradley & Jack L. Goldsmith, Pinochet *and International Human Rights Litigation*, 97 Mich. L. Rev. 2129, 2181 (1999).

IV. IN THE ALTERNATIVE, A FORMER OFFICIAL IS AN AGENCY OR INSTRUMENTALITY OF A FOREIGN STATE

Officials and former officials also satisfy each prong of the definition of an "'agency or instrumentality,'" 28 U.S.C. § 1603(b). *See Fed Ins. Co.*, 538 F.3d at 83; *Keller v. Cent. Bank of Nig.*, 277 F.3d 811, 815-16 (6th Cir. 2002); *Byrd v. Corporacion Forestal y Industrial de Olancho*, 182 F.3d 380, 388-89 (5th Cir. 1999); *El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 671 (D.C. Cir. 1996); *Chuidian*, 912 F.2d at 1101.

First, an official can be an "entity," 28 U.S.C. § 1603(b). *See City of Abilene v. FCC*, 164 F.3d 49, 52 (D.C. Cir. 1999) ("entity" "may include a natural person"); *In re McCook Metals, L.L.C.*, 319 B.R. 570, 587 n.10 (Bankr. N.D. Ill. 2005) (same).

Second, an official is a "separate legal person," 28 U.S.C. § 1603(b)(1). The "word[] 'person'...include[s]

corporations...as well as individuals." 1 U.S.C. § 1; *cf. Weil v. Comm'r*, 173 F.2d 805, 808 (2d Cir. 1949) ("[I]n probate administration, executors are regarded as separate legal persons."). And a "separate legal person" is one, like an individual official, who can "sue or be sued," "contract" or "hold property in [his] own name." 1976 U.S.C.C.A.N. at 6614.[8]

Third, an individual official "is an organ of a foreign state." 28 U.S.C. § 1603(b)(2). *See, e.g.*, *Jaffe*, 13 O.R.3d at 757 ("'[A] State acts through its organs or agencies, which normally include...persons....'"); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170-71 (1803) ("head of a department" is an "organ of executive will"); *Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 109 (1948) (President is "the Nation's organ in foreign affairs").

Fourth, an individual is *not* a corporate entity of the sort excluded from the definition of an "agency or instrumentality" by 28 U.S.C. § 1603(b)(3).

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[8] Respondents contrast the term "separate legal person" with the reference to "a natural person" in 28 U.S.C. § 1610(f)(1)(B). The use of the term "natural person" in this provision simply clarifies that *only* natural persons are implicated. By contrast the term "separate legal person" used in § 1603(b)(1) encompasses both natural and non-natural persons.

CONCLUSION

The judgment of the Fourth Circuit should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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MOHAMED ALI SAMANTAR, PETITIONER

v.

BASHE ABDI YOUSUF, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

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QUESTIONS PRESENTED

1. Whether the immunity from suit of officials of foreign governments acting in their official capacity is governed by the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1602 *et seq.*, which applies to acts by a foreign state, or whether immunity of foreign government officials from suit instead continues to be governed by common law principles of immunity articulated by the Executive Branch, informed by customary international law, in the exercise of its constitutional authority over foreign affairs.

2. If the FSIA were found to govern the immunity from suit of foreign government officials acting in their official capacity, whether such officials lose immunity from suit if the officials are sued after leaving office.

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In the Supreme Court of the United States

No. 08-1555

MOHAMED ALI SAMANTAR, PETITIONER

v.

BASHE ABDI YOUSUF, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

INTEREST OF THE UNITED STATES

This case presents the question whether the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1602 *et seq.*, governs the immunity from suit of officials of foreign governments acting in their official capacity. At the Court's invitation, the United States recently filed a brief as amicus curiae addressing this question. See U.S. Amicus Br., *Federal Ins. Co.* v. *Kingdom of Saudi Arabia*, 129 S. Ct. 2859 (2009) (No. 08-640) (08-640 U.S. Br.). The United States condemns grave human rights abuses of the kind alleged in the complaint in this case, and it has a strong foreign policy interest in promoting the protection of human rights. In addition, the general question of the amenability of foreign officials to suit has significant implications for the reciprocal treat-

ment of United States officials and for our Nation's foreign relations.

STATEMENT

1. For much of our Nation's history, principles adopted by the Executive Branch, which were binding on the courts, determined the immunity of foreign states and their officials in civil suits in courts of the United States. See *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 34-36 (1945). In 1976, Congress enacted the FSIA, which now provides the sole basis for obtaining jurisdiction over a foreign state in a civil case brought in a United States court. *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-435 (1989). Under the FSIA, foreign states and their agencies and instrumentalities are "presumptively immune" unless a claim falls within one of the statute's specified exceptions. *Permanent Mission of India to the U.N.* v. *City of N.Y.*, 551 U.S. 193, 197 (2007) (*Permanent Mission*); 28 U.S.C. 1604. The exceptions permit, *inter alia*, certain actions against a foreign state that arise out of its commercial activities, 28 U.S.C. 1605(a)(2), and certain torts committed in the United States, 28 U.S.C. 1605(a)(5). Congress later amended the Act to include a specific exception for claims of torture, extrajudicial killing, and other terrorism-related acts if the foreign state has been designated as a state sponsor of terrorism, 28 U.S.C. 1605A(a).[1]

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[1] Congress enacted a prior version of the terrorism exception in 1996. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221(a)(1)(C), 110 Stat. 1241 (28 U.S.C. 1605(a)(7) (Supp. II 1996)). In 2008, Congress repealed that provision and enacted an amended terrorism exception. National Defense Authorization Act for Fiscal Year 2008 (NDAA), Pub. L. No. 110-181, sec. 1083(a)(1), § 1605A, 122 Stat. 338 (to be codified at 28 U.S.C. 1605A (Supp. II 2008)); NDAA § 1083(b)(1)(A)(iii), 122 Stat. 341; see *Republic of Iraq* v. *Beaty*, 129

2. Respondents are natives of Somalia, several of whom are now citizens of the United States. They brought this suit against petitioner under the Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102-256, 106 Stat. 73 (28 U.S.C. 1350 note), and the Alien Tort Statute (ATS), 28 U.S.C. 1350. Petitioner is a former high-ranking official of the Barre regime in Somalia, which took power in a 1969 coup. Pet. App. 2a-3a. Respondents allege that in the 1980s, they or their family members were subjected to systematic torture, extrajudicial killing, and other atrocities by military and intelligence agencies of the governing Supreme Revolutionary Council in Somalia, which targeted the clan to which respondents belong.[2] *Id.* at 3a-4a, 36a-42a. Respondents further allege that petitioner exercised command and effective control over agents of the Somali government during his tenure as Minister of Defense from 1980 to 1986, and as Prime Minister from 1987 to 1990. Respondents assert that petitioner is liable for compensatory and punitive damages because he knew or should have known about, and tacitly approved, the abuses allegedly committed by the government agents, and conspired with or aided and abetted those personnel in committing those wrongs. *Id.* at 5a-6a, 43a; J.A. 75-81, 99.

In January 1991, armed opposition factions drove the Barre regime from power, resulting in the complete col-

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S. Ct. 2183, 2186-2187 (2009). All references to 28 U.S.C. 1605A are to that section as it will be codified in Supplement II (2008).

[2] At the time, the State Department documented massive human rights violations by the Somali government. See, *e.g.*, Staffs of the House Comm. on Foreign Affairs & the Senate Comm. on Foreign Relations, 101st Cong., 2d Sess., *Country Reports on Human Rights Practices for 1989*, at 321-326 (Joint Comm. Print 1990) (prepared by Dep't of State).

lapse of Somalia's central government. Bureau of African Affairs, U.S. Dep't of State, *Background Note: Somalia* (Jan. 2010) <http://www.state.gov/r/pa/ei/bgn/2863.htm> (*Background Note*). Respondents allege that in the wake of the government's collapse, petitioner fled the country, and has been living in Virginia since 1997. Pet. App. 6a; J.A. 40, 64. Although the United States recognized the Barre regime, since the fall of that government, the United States has not recognized any entity as the government of Somalia.[3] *Background Note*.

3. Petitioner filed a motion to dismiss the complaint, contending that he is immune from this suit under the FSIA, and that the district court accordingly lacked subject-matter jurisdiction. Pet. App. 43a-45a. Respondents did not contend that their suit came within any of the FSIA's exceptions to immunity. *Id.* at 46a-47a. Instead, they argued that petitioner was not immune because his alleged actions violated international human rights law and so were outside the scope of his official authority. *Id.* at 48a.

The district court rejected that contention. It observed that respondents' complaint alleged that petitioner acted in his capacity as Defense Minister or Prime Minister of Somalia. Pet. App. 53a-54a. The court also accorded "great weight" to the representation by the

[3] Following the collapse of the Barre regime, reconciliation conferences among warring Somali factions have resulted in the creation of a transitional Somali government, the Transitional Federal Government (TFG). See *Background Note*. The United States supports the efforts of the TFG to establish a viable central government, see Hillary Rodham Clinton, Secretary of State, *Remarks with Somali Transitional Federal Government President Sheikh Sharif Sheikh Ahmed* (Aug. 6, 2009) <http://www.state.gov/secretary/rm/2009a/08/126956.htm>, but does not recognize the TFG as the sovereign government of Somalia. The United States does continue to recognize the State of Somalia.

Somali Transitional Federal Government (TFG)—which the court incorrectly described as "supported by and recognized by the United States as the governing body in Somalia"—that petitioner's alleged actions were taken in his official capacities. *Id.* at 54a-55a, 57a, 61a (citation omitted); see note 3, *supra*. The district court therefore concluded that the FSIA conferred immunity on petitioner. Pet. App. 61a-63a.

4. The court of appeals reversed and remanded. The court first considered petitioner's argument that the FSIA, which governs the immunity of a "foreign state" and any "agency or instrumentality" of the state, see 28 U.S.C. 1603(a), provides immunity to foreign officials from personal damage actions because the officials are instrumentalities of the state. The court rejected that argument, reasoning that Section 1603(b) defines an "agency or instrumentality" to include only corporate and other legal entities, not natural persons. Pet. App. 17a-19a. The court found support for that conclusion in the structure and legislative history of the FSIA. *Id.* at 19a-20a. The court therefore held that "the FSIA does not apply to individuals and, as a result, [petitioner] is not entitled to immunity under the FSIA." *Id.* at 3a.[4]

The court further concluded that even if the FSIA did apply to individual foreign officials, it would provide immunity only for individuals who were state officials at the time suit was brought. Pet. App. 21a-25a. The court relied on *Dole Food Co.* v. *Patrickson*, 538 U.S. 468 (2003),

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[4] Respondents also argued that the FSIA was inapplicable because Somalia currently does not exist in a form that could qualify it as a "foreign state" for purposes of the FSIA. In light of its conclusion that the FSIA does not govern claims of immunity by individual foreign officials, the court of appeals did not address that issue. Pet. App. 11a n.3; see also *id.* at 47a n.12.

which held that because Section 1603(b) uses the present tense in describing the necessary attributes of an "agency or instrumentality," the entity in question must satisfy Section 1603(b)'s requirements at the time the suit is filed. Pet. App. 21a-25a.

The court of appeals therefore reversed the district court's dismissal of the action based on the FSIA, and remanded for the district court to consider petitioner's contention that he is immune from suit under common law immunity principles, as well as the other issues raised by petitioner. Pet. App. 25a-26a.

SUMMARY OF ARGUMENT

In the view of the United States, principles articulated by the Executive Branch, not the FSIA, properly govern the immunity of foreign officials from civil suit for acts in their official capacity.

I. Throughout the Nation's history, the Executive and Judicial Branches have recognized that a foreign state is usually immune from suit in United States courts. *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812). In light of the potentially significant foreign relations consequences of subjecting another sovereign state to suit, courts traditionally deferred to the Executive Branch's judgment whether the foreign state should be accorded immunity in a given case. *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 487 (1983). These Executive Branch principles, which are informed by customary international law and practice, similarly included the recognition that both current and former officials of a foreign state usually enjoy immunity for acts undertaken in their official capacity. See, *e.g.*, *Underhill* v. *Hernandez*, 65 F. 577, 579-580 (2d Cir. 1895), aff'd, 168 U.S. 250 (1897).

Enacted against this backdrop, the FSIA sets forth a general rule of immunity for a "foreign state." 28 U.S.C. 1604. The FSIA makes no reference to the immunity of individual foreign officials, and its text, structure and legislative history demonstrate that Congress did not intend the FSIA to govern such determinations or to displace Executive Branch principles governing the immunity of current and former officials. Particularly because the historical practice of deferring to the Executive's determinations as to immunity arose out of the Executive's traditional prerogative with respect to the sensitive diplomatic and foreign-policy judgments implicated by immunity questions, the FSIA should not be read to have altered that practice *sub silentio*. Therefore, foreign officials' immunity continues to be governed by the generally applicable principles of immunity articulated by the Executive Branch.

That conclusion derives additional support from the complexity of certain official immunity determinations, which could not be accommodated under the rigid statutory framework of the FSIA. In this case, for example, the Executive reasonably could find it appropriate to take into account petitioner's residence in the United States rather than Somalia, the nature of the acts alleged, respondents' invocation of the statutory right of action in the TVPA against torture and extrajudicial killing, and the lack of any recognized government of Somalia that could opine on whether petitioner's alleged actions were taken in an official capacity or that could decide whether to waive any immunity that petitioner otherwise might enjoy. It is unlikely that Congress, in enacting the FSIA, intended to divest the Executive of the ability to evaluate complex considerations like these in

deciding whether to recognize a foreign official's immunity.

II. If this Court should hold, contrary to our view, that the FSIA governs the immunity of foreign officials, that holding should not serve to strip former officials of their immunity. Nothing in the FSIA suggests that Congress intended to accord immunity to current officials but not former officials. The grounds of the Court's decision, however, will determine whether the immunity of former officials derives from the FSIA itself or from background common law principles. Again assuming that the Court holds that the FSIA plays any role in questions of official immunity, the Court should select the theory—resting on the "agency or instrumentality" language on the FSIA, 28 U.S.C. 1603(a)—that allows most room for these principles of Executive judgment to operate. Under either theory, a remand would be required to apply the relevant standards and determine whether petitioner has immunity.

ARGUMENT

I. PRINCIPLES ADOPTED BY THE EXECUTIVE BRANCH, INFORMED BY CUSTOMARY INTERNATIONAL LAW, GOVERN THE IMMUNITY OF FOREIGN OFFICIALS ACTING IN THEIR OFFICIAL CAPACITY

A. The Foreign Sovereign Immunities Act Was Enacted Against The Backdrop Of Judicial Deference To Suggestions And Principles Of Immunity Articulated By The Executive Branch For Foreign States And Foreign Officials

1. The United States has long adhered to the principle that foreign states are generally immune from suit in our courts. *The Schooner Exchange*, 11 U.S. (7 Cranch) at 137. Wrongs perpetrated by foreign sovereigns have

been recognized as ordinarily appropriate "for diplomatic, rather than legal," resolution. *Id.* at 146. In light of the potentially significant foreign relations consequences of subjecting another sovereign state to suit in our courts, the Court historically looked to "the political branch of the government charged with the conduct of foreign affairs" to determine whether immunity should be recognized. *Hoffman*, 324 U.S. at 34.

The Executive Branch traditionally provided the judiciary with suggestions of immunity, based on the Executive Branch's judgments regarding customary international law and reciprocal practice. *Verlinden*, 461 U.S. at 487; see, *e.g.*, *Ex parte Peru*, 318 U.S. 578, 589 (1943). When the Executive Branch made no specific recommendation, the courts decided the immunity question "in conformity to the principles" the Executive Branch had previously articulated. See *Hoffman*, 324 U.S. at 35.

Until 1952, the Executive Branch followed a theory of absolute foreign sovereign immunity. Under that doctrine, "a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign," regardless of the nature of the acts alleged to have been committed. *Permanent Mission*, 551 U.S. at 199 (quoting Letter from Acting Legal Adviser Tate to Acting Attorney General Perlman (1952) (*Tate Letter*), *reprinted in Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682 App. (1976)). In 1952, the State Department adopted the "restrictive" theory of foreign sovereign immunity, under which foreign states are afforded immunity only for their sovereign or public acts, and not for their commercial or other private acts. See *Dunhill*, 425 U.S. at 698; *id.* App. at 711 (*Tate Letter*); see also *Isbrandtsen Tankers, Inc.* v. *President of India*, 446 F.2d 1198, 1200 (2d Cir.) (deferring to Executive's deter-

mination that alleged conduct was "of a public, as opposed to a private/commercial, nature," and therefore state was immune), cert. denied, 404 U.S. 985 (1971). After 1952, the Executive Branch relied upon the restrictive theory to inform its suggestions of immunity, and courts applied the restrictive theory when the Executive did not express its views.

2. The United States also has recognized the immunity of individual foreign officials "from suits brought in [United States] tribunals for acts done within their own States, in the exercise of governmental authority." *Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897). The Executive asserted that position on several occasions early in the Nation's history. See, *e.g.*, *Suits Against Foreigners*, 1 Op. Att'y Gen. 45, 46 (1794) ("[I]f the seizure of the vessel is admitted to have been an official act, done by the defendant * * *, [that] will of itself be a sufficient answer to the plaintiff's action."); *Actions Against Foreigners*, 1 Op. Att'y Gen. 81, 81 (1797) ("[A] person acting under a commission from the sovereign of a foreign nation is not amenable for what he does in pursuance of his commission, to any judiciary tribunal in the United States.").

The courts too have long recognized foreign official immunity in a variety of contexts. See, *e.g.*, *The Schooner Exchange*, 11 U.S. (7 Cranch) at 138; *Jones* v. *Le Tombe*, 3 U.S. (3 Dall.) 384, 385 (1798) ("[T]he contract was made on account of the government * * * and therefore, there was no cause of action against the present defendant."). As in suits against foreign states, the courts traditionally deferred to the Executive Branch's judgment whether an official should be accorded immunity in a given case, see, *e.g.*, *Greenspan* v. *Crosbie*, No. 74 Civ. 4734 (GLG), 1976 WL 841, at *1-*2 (S.D.N.Y.

Nov. 23, 1976); *Waltier* v. *Thomson*, 189 F. Supp. 319, 320-321 (S.D.N.Y. 1960), and applied the principles articulated by the Executive in cases in which the Executive did not express a position, see *Heaney* v. *Government of Spain*, 445 F.2d 501, 504-506 (2d Cir. 1971).

The immunity of foreign officials was traditionally not limited to current employees of the foreign government. See, *e.g.*, *Underhill*, 65 F. at 580; *Hatch* v. *Baez*, 14 N.Y. Sup. Ct. 596, 600 (1876) ("The fact that the defendant has ceased to be president of St. Domingo does not destroy his immunity."). That is because the immunity of foreign officials arises from the official character of their acts.[5] See *ibid.* (Immunity "springs from the capacity in which the acts were done, and protects the individual who did them."). The Executive Branch has therefore recognized that the immunity enjoyed by a foreign official generally survives his departure from office. Affording former officials residual immunity from civil suits based on actions in their official capacity is consistent with customary international law. See, *e.g.*, Vienna Convention on Diplomatic Relations (VCDR), *done* Apr. 18, 1961, art.

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[5] Under customary international law, head-of-state immunity is distinct from, and provides greater protection than, the immunity of lower-level foreign officials. See *Arrest Warrant of 11 Apr. 2000 (Dem. Rep. Congo* v. *Belgium)*, 2002 I.C.J. 3, 21-22. The Executive Branch retains its traditional pre-FSIA authority to suggest the immunity from suit of heads of state and other high officials. See, *e.g.*, *Ye* v. *Zemin*, 383 F.3d 620 (7th Cir. 2004), cert. denied, 544 U.S. 975 (2005). After these high ranking officials leave office, they generally retain residual immunity only for their official acts. See 1 *Oppenheim's International Law* 1043-1044 (Robert Jennings & Arthur Watts, eds., 9th ed. 1996). Respondents have sued petitioner for conduct, in part, when he was Prime Minister of Somalia, Pet. App. 5a, and the court of appeals remanded in part to permit the district court to consider petitioner's claim of head-of-state immunity, *id.* at 25a-26a. That issue is not before the Court.

39(2), 23 U.S.T. 3227, 3245; *Report of the International Law Commission on the Work of its Forty-Third Session* at 25, U.N. Doc. A/46/10(Supp.) (Sept. 1, 1991) (Commentary on Draft Articles on Jurisdictional Immunities of States and Their Property). It also promotes the United States' interests in comity with other nations. See *The Schooner Exchange*, 11 U.S. (7 Cranch) at 137; *Hatch*, 14 N.Y. Sup. Ct. at 600; see also *Boos* v. *Barry*, 485 U.S. 312, 323-324 (1988).[6]

As petitioner notes (Br. 27), the basis for recognizing the immunity for current and former foreign officials is that "the acts of the official representatives of the state are those of the state itself, when exercised within the scope of their delegated powers." *Underhill*, 65 F. at 579. But petitioner is incorrect to extrapolate (Br. 17, 44) from that principle the conclusion that a suit against a foreign official is invariably equivalent to a suit against the foreign state itself.

Suits like this one "seek to impose individual liability upon a government officer," not the state itself. *Hafer* v. *Melo*, 502 U.S. 21, 25 (1991). They seek damages against the individual personally, not against the foreign state. To be sure, personal damage suits against foreign offi-

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[6] The Executive Branch's recognition of foreign official immunity in the civil context does not imply that foreign officials are entitled to immunity in a criminal case brought by the United States. In choosing to prosecute a foreign official, the Executive Branch has necessarily determined that the official is not properly protected by immunity. See, *e.g.*, *United States* v. *Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997), cert. denied, 523 U.S. 1060 (1998); cf. *Regina* v. *Bow St. Metro. Stipendiary Magistrate*, [2000] 1 A.C. 147 (H.L. 1999) (appeal taken from Eng.) (*Ex parte Pinochet*) (former official not entitled to immunity from criminal liability under the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment for torture committed in an official capacity).

cials based on actions taken in their official capacity may require the court to sit in judgment of a foreign state's actions, much as in a suit against the state itself. See, *e.g.*, *Greenspan*, 1976 WL 841, at *2; *Jaffe* v. *Miller*, 13 O.R.3d 745 (1993), *reprinted in* 95 I.L.R. 446. But the remedial, substantive, and prudential concerns raised by suits against officials and suits against the state are not identical.

For this reason, the scope of immunity for foreign officials is not necessarily co-extensive with that of foreign states—and can diverge in either direction. After endorsing the restrictive theory of immunity for foreign states, the Executive Branch has recognized the immunity of foreign officials for their official acts in some circumstances in which the state itself would not be immune. See *Greenspan*, 1976 WL 841, at *2 (Executive suggestion that officials were immune from fraud suit based on state's commercial activities). Conversely, there are circumstances in which a foreign state would be immune (and indeed potentially not implicated at all) but the individual officer would not be immune, as when the individual acts outside his official capacity.

B. The FSIA Does Not Govern The Immunity Of Foreign Officials From Private Damages Actions

In 1976, Congress enacted the FSIA, which, "[f]or the most part, * * * codifies, as a matter of federal law, the restrictive theory of sovereign immunity." *Verlinden*, 461 U.S. at 488. By its terms, the FSIA governs the immunity of a "foreign state," 28 U.S.C. 1604, which is defined to "include[]" a "political subdivision" and an "agency or instrumentality" of the foreign state. 28 U.S.C. 1603(a). The FSIA makes no reference to the immunity of individual foreign officials.

Accordingly, as the Solicitor General recently informed this Court, the United States generally recognizes foreign officials to enjoy immunity from civil suits with respect to their official acts, but that immunity is properly founded on non-statutory principles articulated by the Executive Branch, not the FSIA. 08-640 U.S. Br. 6. Because the FSIA does not address the immunity of foreign officials, the FSIA left in place the pre-existing practice of recognizing official immunity in accordance with suggestions of immunity by the Executive Branch.

Petitioner nonetheless argues that the FSIA confers immunity on him as a statutory matter. Petitioner first argues that foreign officials are encompassed within the term "foreign state" because they are agents of the state and their acts constitute the acts of the state itself. Br. 23. Therefore, he continues, wherever the FSIA refers to the "foreign state," that term should be construed to include foreign officials. Petitioner also contends that a foreign official is an "agency or instrumentality" of the state. Br. 23, 45-47. Neither argument can be reconciled with the text, structure, and legislative history of the FSIA.

1. a. The FSIA sets forth a general rule of immunity of a "foreign state," 28 U.S.C. 1604, without mentioning the immunity of individuals. At the time of the FSIA's enactment, the term "state" had long been understood to refer to a group of people within a defined territory, not to individual officials within that territory. See, *e.g.*, J.L. Brierly, *The Law of Nations* 126 (Humphrey Waldock ed., 6th ed. 1963) (referring to "a state" as an "institution"); William Edward Hall, *A Treatise on International Law* 17 (A. Pearce Higgins ed., 8th ed. 1924) (state is a "community" that is permanently established for a political end, has a defined territory, and is independent

of outside control); Theodore Dwight Woolsey & Theodore Salisbury Woolsey, *Introduction to the Study of International Law* § 36, at 34 (6th ed. 1901) (state is a "community of persons living within certain limits of territory" under an organization). It is therefore unlikely that Congress would have used the term "foreign state" to refer both to the state itself and to the individuals it employs.

b. Indeed, the FSIA's text expressly distinguishes between a "foreign state" and its officials, thereby confirming that Congress did not view the term "foreign state" as including individual officials. In enacting the FSIA, Congress created an exception to foreign sovereign immunity for certain domestic torts, providing that "[a] *foreign state* shall not be immune" in a case "in which money damages are sought against a foreign state for personal injury * * * occurring in the United States and caused by the tortious act or omission *of that foreign state* or *of any official or employee of that foreign state* while acting within the scope of his office or employment." 28 U.S.C. 1605(a)(5) (emphases added). If Congress believed, as petitioner argues, that "individual agents of a foreign state, when they perform their official duties, *are* the 'foreign state' for purposes of the FSIA," Br. 42 (citation omitted), Congress would not have needed to separately mention the acts of a foreign official or employee in Section 1605(a)(5).

When Congress subsequently established another exception to immunity, applicable to claims of torture, extrajudicial killing, and certain other acts of terrorism brought against states designated as state sponsors of terrorism, Congress again differentiated between the state and its officials. Congress there provided that "[a] foreign state" shall not be immune for such acts "en-

gaged in by *an official, employee, or agent of such foreign state* while acting within the scope of his or her office, employment, or agency." 28 U.S.C. 1605A(a)(1) (emphasis added). Petitioner asserts that Section 1605A(a)(1) "creat[es] an exception to individual immunity" that would be unnecessary if officials were not otherwise immune under the FSIA. Br. 42 (citing *In re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d 71, 84 (2d Cir. 2008), cert. denied, 129 S. Ct. 2859 (2009)). But the provision expressly abrogates immunity only for the "foreign state" itself; it does not relate at all to the immunity of individual officials.

Moreover, Section 1605A(c) creates a right of action against "[a] foreign state that is or was a state sponsor of terrorism * * * and any official, employee, or agent of that foreign state while acting within the scope of his or her office." 28 U.S.C. 1605A(c). The absence of any provision in Section 1605A separately addressing the immunity of those individuals—even though Subsection (a) refers to their acts in its abrogation of the *state*'s immunity, and Subsection (c) creates a cause of action against them—reinforces the conclusion that the FSIA does not govern the immunity of those foreign officials to begin with.[7]

c. It also is significant that Section 1603(a)'s definition of "foreign state" specifically "includes a political subdivision of a foreign state or an agency or instrumen-

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[7] Contrary to petitioner's argument (Br. 42), the creation of a statutory right of action in Section 1605A(c) against officials as well as the state itself does not suggest that the immunity provisions of the FSIA apply to individuals. See, *e.g.*, *Cicippio-Puleo* v. *Islamic Republic of Iran*, 353 F.3d 1024, 1033 (D.C. Cir. 2004) (noting "distinction * * * between statutory provisions that waive sovereign immunity and those that create a cause of action").

tality of a foreign state," but makes no mention of individual foreign officials. 28 U.S.C. 1603(a). Petitioner nonetheless insists that the "agency or instrumentality" language supports him, seeing that language both as itself encompassing foreign officials, and as demonstrating that Congress intended the term "foreign state" to "include[]" natural persons who are agents of the state. Br. 23, 45-47. Both arguments are without merit.

Section 1603(b) defines "agency or instrumentality" as an "entity" that satisfies all of the following conditions: (1) it is a "separate legal person, corporate or otherwise"; (2) it is an organ of, or a majority of its shares is owned by, a foreign state or political subdivision; and (3) it is neither "a citizen of a State of the United States as defined in" the corporate-citizenship provisions of 28 U.S.C. 1332(c) and (e), nor an entity "created under the laws of any third country." 28 U.S.C. 1603(b). This definition is replete with terms that are "not usually used to describe natural persons." *Tachiona* v. *United States*, 386 F.3d 205, 221 (2d Cir. 2004), cert. denied, 547 U.S. 1143 (2006); see *Enahoro* v. *Abubakar*, 408 F.3d 877, 881 (7th Cir. 2005), cert. denied, 546 U.S. 1175 (2006). Thus, contrary to petitioner's arguments (Br. 45-47), the statutory definition makes clear that Congress intended Section 1603(b) to reach only corporate and other organizational entities, not individual foreign officials. See *Patrickson*, 538 U.S. at 474 (Section 1603(b) indicates that "Congress had corporate formalities in mind.").

Petitioner further contends, however, that even if "agency or instrumentality" does not encompass natural persons, Section 1603(a)'s use of the term "includes" indicates that Congress intended to define "foreign state" broadly, to include not only "agenc[ies]" and "instrumentalit[ies]," but also individual "agents" and any "oth-

er means through which nations necessarily act." Br. 22-24. As petitioner notes, the term "includes" can connote "an illustrative application of the general principle." *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U.S. 95, 99-100 (1941). But that does not mean that Section 1603(a) is devoid of any limiting principle. Under the canon of *noscitur a sociis*, "a word is given more precise content by the neighboring words with which it is associated." *United States* v. *Williams*, 128 S. Ct. 1830, 1839 (2008); *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). Here, the categories expressly included within the definition of "foreign state"—political subdivisions, agencies, and instrumentalities—are all entities that are created by, or are a part of, the state. None are natural persons. This focus demonstrates that Congress intended to limit the term "foreign state" to the state itself and the non-natural entities that it creates. See *Enahoro*, 408 F.3d at 881-882 ("If Congress meant to include individuals acting in their official capacity in the scope of the FSIA, it would have done so in clear and unmistakable terms."). Petitioner's reading would thus expand Section 1603(a) well beyond its natural and intended scope. See *Jarecki*, 367 U.S. at 307.

2. The FSIA's legislative history confirms that Congress did not intend to supplant existing principles regarding the immunity of foreign officials, as opposed to foreign states. The House Report emphasizes that the FSIA was not "intended to affect either diplomatic or consular immunity." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 12 (1976) (*FSIA Report*). In discussing Section 1605(a)(5)—which excepted certain torts committed by the state or its officials from immunity, and was the only contemporaneously enacted provision that mentioned foreign officials, see p. 15, *supra*—the *FSIA Report* reit-

erated that the FSIA would "deal[] only with the immunity of foreign states and not its diplomatic or consular representatives." *FSIA Report* 21.[8]

Congress thus assumed that existing law would continue to govern the immunity of those officials. See *FSIA Report* 8 (contrasting "diplomatic immunity (which is drawn into issue when an individual diplomat is sued)" with "sovereign immunity," which applies to "foreign state[s]"). In particular, the *FSIA Report* noted that with regard to discovery, "official immunity," of a kind existing separate from and outside of the FSIA, would apply if a litigant sought to depose a "high-ranking official of a foreign government." *Id.* at 23.

The legislative history also confirms that Congress had corporations and not natural persons in mind when it defined "agency or instrumentality." The *FSIA Report* explains that "[a]s a general matter, entities which meet the definition of an 'agency or instrumentality of a foreign state' could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name." *FSIA Report* 15-16. No natural person appears in the list of examples. In addition, in discussing an amend-

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[8] Hearing testimony also underscored the FSIA's inapplicability to foreign officials. See *Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 16 (1973) (statement of Bruno Ristau, U.S. Dep't of Justice) ("[W]e are not talking * * * in terms of permitting suit against the Chancellor of the Federal Republic [of Germany]. * * * That is an altogether different question.").

ment to the venue statute addressing suits "against an agency or instrumentality of a foreign state as defined in section 1603(b)," 28 U.S.C. 1391(f)(3), the *FSIA Report* explains (at 32) that the amendment "is based on 28 U.S.C. 1391(c)," the provision regarding venue in suits against corporations. Congress made no reference to the provision for venue of suits against individuals.

3. The legislative history of the TVPA, enacted in 1992, does contain a discussion of the FSIA and its potential application to individual officials, but that history does not compel any different result. In the TVPA, Congress created a right of action against individuals alleged to have committed torture or extrajudicial killing "under actual or apparent authority, or color of law, of any foreign nation." TVPA § 2(a), 106 Stat. 73. The TVPA's legislative history indicates that the Senate Judiciary Committee believed that the TVPA would not affect traditional diplomatic or head-of-state immunities but, consistent with longstanding principles, that these immunities would not protect such officials after they left office. See S. Rep. No. 249, 102d Cong., 1st Sess. 7-8 (1991) (*TVPA Report*); see note 5, *supra*. In addition, the House and Senate Committees appeared to assume, consistent with the Ninth Circuit's then-recent decision in *Chuidian* v. *Philippine Nat'l Bank*, 912 F.2d 1095 (9th Cir. 1990), that the FSIA would govern the determination of immunity for other foreign officials while in office and for all former foreign officials. *TVPA Report* 8 (citing 28 U.S.C. 1603(b), which defines "agency or instrumentality" of the foreign state, as providing the basis for official immunity); H.R. Rep. No. 367, 102d Cong., 1st

Sess. Pt. 1, at 5 (1991).[9] That apparent assumption, however, was incorrect. As noted above, the text, structure and legislative history of the FSIA as originally enacted demonstrate that Congress did not intend the FSIA to govern individual officials' immunity. Against that background, the assumption of a congressional committee 15 years later, following a single appellate court decision, would be a "hazardous basis for inferring the intent of an earlier Congress" in enacting the FSIA. See *United States* v. *Texas*, 507 U.S. 529, 535 n.4 (1993) (citation omitted).

4. Petitioner contends that Congress must have intended the term "foreign state" to encompass foreign officials, despite the absence of any provision to that effect, because a suit against a foreign official "for actions undertaken on behalf of the state is in reality a suit against the 'foreign state' itself." Br. 24. To be sure, immunity ordinarily attaches when (and because) the individual was acting as an officer of the foreign state. See, *e.g.*, *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 303 (1918); *Underhill*, 65 F. at 579. But it does not follow that Congress must have treated suits against individual foreign officials identically to suits against foreign states. To the contrary, if Congress intended the FSIA to gov-

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[9] The TVPA's legislative history also describes the Senate Committee's understanding of how to decide whether an official covered by the FSIA would have immunity from suit. In the Committee's view, that determination would require the official to prove "an agency relationship to [the] state," which it suggested would require the state to "admit some knowledge or authorization of the relevant acts." *TVPA Report* 8. The Committee further observed that because all states are officially opposed to torture and extrajudicial killing, the FSIA should normally not provide a defense to an action brought under the TVPA against an individual acting "under actual or apparent authority, or color of law, of any foreign nation," TVPA § 2(a), 106 Stat. 73. *TVPA Report* 8.

ern the amenability to suit of foreign officials, it likely would have addressed a number of issues raised by such suits. Yet the statute does not do so.

First, as noted earlier, the scope of immunity that individual foreign officials enjoy under traditional principles can be either more or less extensive than the immunity of the state itself. In some circumstances, individual immunity will be narrower. For example, a foreign state is entitled to immunity for any acts unless one of the FSIA's exceptions applies, 28 U.S.C. 1604, but officials are usually immune only for acts taken in their official capacity. Conversely, the Executive Branch has on occasion suggested the immunity of a foreign official even when the state would lack immunity for the same conduct. See *Greenspan*, 1976 WL 841, at *2 (official immunity for commercial activities). That would be the case, for example, when a suit falls within one of the exceptions to foreign sovereign immunity for contractual or other commercial activities or expropriations, see 28 U.S.C. 1605(a)(2) and (3), and a state, but not an individual, is appropriately held liable for the potentially huge monetary sums at stake. In a variety of contexts, personal damage actions against foreign officials can unduly chill their performance of duties, trigger reciprocity concerns about the treatment of United States officials sued in foreign courts, and interfere with the Executive Branch's conduct of foreign affairs—even when a state itself can be sued.

Given these and other relevant factors, Congress is unlikely to have inflexibly linked the immunity of foreign officials to that of their states—and, without saying so, to have substituted a rigid statutory regime for the preexisting authority of the Executive to take into account, in determining whether to suggest immunity, the distinc-

tive considerations that suits against foreign officials may raise.[10] At the least, had Congress contemplated that the FSIA would address the immunity of individual foreign officials, it would have specified the category of acts for which such immunity would lie. The foreign state and its agencies and instrumentalities are absolutely immune from suit on any basis and for any acts unless one of the express exceptions in the FSIA applies. But Congress surely would not have intended to confer an absolute immunity on individual foreign officials, including for their wholly private conduct. Accordingly, if those individuals were to be covered, Congress presumably would have included in the general rule of immunity in 28 U.S.C. 1604 an express limitation to clarify when an official's conduct could be considered an act of the foreign state for immunity purposes. Congress might also have expanded or restricted one or another of the exceptions to immunity in Section 1605(a) as applied to individual officials to take account of the differences between suits against the state and suits against individual officials.

Second, if Congress had intended the FSIA to govern suits against individual foreign officials, the statute likely would have addressed the available remedies. Section 1610 provides litigants with broader rights to attach the property of agencies and instrumentalities compared to the property of the foreign state itself, and Section 1606

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[10] This case vividly illustrates the point, as discussed further at pp. 24-26, *infra*. For apparently under petitioner's view the FSIA, *sub silentio*, would have altogether divested the Executive of the ability to consider in its immunity determination such features of this case as petitioner's residence in the United States rather than in Somalia, respondents' invocation of the statutory cause of action in the TVPA, and the absence of a recognized government in Somalia.

similarly permits punitive damages against agencies and instrumentalities but not against the state. 28 U.S.C. 1606, 1610(a) and (b). Congress's careful calibration of these remedies renders its silence with respect to the personal funds and property of individual foreign officials particularly telling.

Third, the FSIA does not expressly provide for service of process on individuals. Section 1608(b), which governs service on agencies and instrumentalities, provides that in the absence of a special arrangement, service may be made on "an officer, a managing or general agent, or to any other agent [so] authorized by appointment or by law." 28 U.S.C. 1608(b)(2). That provision parallels the corporate service method set forth in Federal Rule of Civil Procedure 4(h)(1)(B), providing further confirmation that natural persons are not agencies or instrumentalities. Section 1608(a), which governs service on the state itself, also makes no mention of service on individuals; rather, it permits service by special arrangement with the state; in accordance with an international convention; on the head of the ministry of foreign affairs of the state; or "through diplomatic channels to the foreign state." 28 U.S.C. 1608(a). Notably, Section 1608(a) does not invoke any of Rule 4's detailed provisions for serving individuals in the United States and foreign countries. See Fed. R. Civ. P. 4(e) and (f).

5. The conclusion that the FSIA does not govern foreign official immunity is reinforced by the number of complexities that could attend the immunity determination in this and other cases—complexities that could not be accommodated under the rigid and ill-fitting statutory regime of the FSIA. Even in an ordinary case, in considering whether to recognize immunity of a foreign official under the generally applicable principles of immunity

discussed above, the Executive might find it appropriate to take into account issues of reciprocity, customary international law and state practice, the immunity of the state itself, and, when appropriate, domestic precedents. But in this case, the Executive may also find the nature of the acts alleged—and whether they should properly be regarded as actions in an official capacity—to be relevant to the immunity determination. Respondents have not only relied on the ATS to assert a federal common law cause of action, but have also invoked the statutory right of action in the TVPA for damages based on torture and extrajudicial killing. And respondents, some of whom are United States citizens, have brought that action against a former Somali official who now lives in the United States, not Somalia.

Furthermore, as noted above, the *TVPA Senate Report* contemplated—and a number of courts have held—that the foreign state's position on whether the alleged conduct was in an official capacity would be an important consideration in determining an official's immunity. See, *e.g.*, *Matar* v. *Dichter*, 563 F.3d 9, 11, 14 (2d Cir. 2009) (noting Executive Branch's recognition of the Israeli government's assertion that its former official acted "in furtherance of official policies of the State of Israel"); *In re Estate of Marcos, Human Rights Litig.*, 25 F.3d 1467, 1471 (9th Cir. 1994) (finding no immunity, relying in part on Philippine government's representation that former president's acts were "not official acts pursuant to his authority as President"), cert. denied, 513 U.S. 1126 (1995); see also *Jones* v. *Ministry of Interior*, [2007] 1 A.C. 270, 281 (H.L. 2006) (appeal taken from Eng.) (finding immunity where Saudi Arabia asserted it for sitting

officials).[11] Here, however, the United States does not recognize any government that can speak on behalf of Somalia.

Also, a foreign state may seek to waive the immunity of a current or former official, because immunity is accorded to foreign officials not for their personal benefit, but for the benefit of the foreign state. See, *e.g.*, VCDR, pmbl., art. 32(1), 23 U.S.T. at 3230, 3241; Vienna Convention on Consular Relations, *done* Apr. 24, 1963, pmbl., 21 U.S.T. 77, 79; *Paul* v. *Avril*, 812 F. Supp. 207, 210-211 (S.D. Fla. 1992). But the issue of waiver is likewise rendered difficult in this case because the United States does not currently recognize any government of Somalia that could render a formal waiver.

In sum, it is unlikely that in enacting the FSIA, Congress *sub silentio* removed the Executive's ability to take complex considerations like these into account in deciding whether to recognize immunity of foreign officials from civil actions.

6. Petitioner contends that a number of adverse consequences would flow from construing the FSIA not to govern the immunity of foreign officials. That is incorrect. Petitioner's arguments that his interpretation is necessary to avoid abrogating the immunity of foreign officials (Br. 26), to avoid violating international law by subjecting officials to suit (Br. 40-41), to avoid opening United States officials to a "heightened risk of reciprocal actions abroad" (Br. 39), and to avoid inviting a flood of litigation in U.S. courts (Br. 33-35), all assume that for-

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[11] In *Jones*, [2007] 1 A.C. at 290, the House of Lords held that the British State Immunity Act 1978 provided immunity to sitting officials for alleged acts of torture, but noted that officials sued in United States courts for torture or extrajudicial killing under the TVPA might not be immune from suit, *id.* at 297.

eign officials have immunity under the FSIA or not at all. But that is not so: officials generally continue to enjoy immunity under background principles for their official acts, and fidelity to international norms and the protection of United States officials abroad are important factors that the Executive Branch considers in determining whether to suggest immunity for particular foreign officials. Indeed, in some circumstances the immunity of officials under Executive Branch principles may be broader than (as in other circumstances it may be narrower than) that of the state under the FSIA.

C. The FSIA Did Not Abrogate The Long-Recognized Immunity From Suit Of Foreign Officials, Rooted In The Executive Branch's Constitutional Authority To Conduct Foreign Affairs

1. In the FSIA, Congress codified the substantive principles that the Executive Branch had used to govern its immunity determinations with respect to foreign states and their instrumentalities. At the same time, Congress altered the pre-existing procedure for making such determinations, replacing the prior regime of Executive suggestions of immunity with statutory standards to be applied by the courts. *FSIA Report* 7 ("A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch.").

By contrast, the FSIA contains no text altering or otherwise addressing the background common law principles relating to foreign officials' immunity to suit. Sensitive diplomatic and foreign policy judgments are involved in determining the contours of official immunity and any refinements or exceptions to it, and in assessing the significance of unfolding international law and prac-

tice in making those determinations. Such judgments are ordinarily committed to the Executive as an aspect of the Executive Branch's prerogative to conduct foreign affairs on behalf of the United States, see, *e.g.*, *Ex parte Peru*, 318 U.S. at 588. The FSIA should not be read to have altered that practice *sub silentio*. See *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952) ("Statutes which invade the common law * * * are to be read with a presumption favoring the retention of long-established and familiar principles."). Therefore, foreign officials' immunity continues to be governed by the pre-existing practice, under which courts defer to Executive suggestions and principles of immunity with respect to foreign officials. See *Enahoro*, 408 F.3d at 881-882; *Ye*, 383 F.3d at 625; *Noriega*, 117 F.3d at 1212.

2. After concluding that the district court erred in holding that this suit must be dismissed under the FSIA, the court of appeals declined to consider whether petitioner is entitled to official immunity under background principles recognized by the Executive and the courts. It instead remanded to the district court to consider that question in the first instance. That was the correct disposition. Because neither court below passed on that question, there is no occasion for this Court to do so.

II. IF THE FSIA GOVERNS THE IMMUNITY FROM SUIT OF SITTING FOREIGN GOVERNMENT OFFICIALS FOR ACTIONS IN AN OFFICIAL CAPACITY, THEY GENERALLY RETAIN THAT IMMUNITY AFTER LEAVING OFFICE

If this Court were to agree with petitioner that the FSIA applies to sitting foreign officials, former officials generally will retain immunity for their official acts. That would be so under either of the two theories petitioner has advanced in arguing that the FSIA governs

his immunity. But petitioner's "agency or instrumentality" theory offers the better approach to that result because under that theory the FSIA would not intrude so deeply on pre-existing common law principles of official immunity.

1. At the time of the FSIA's enactment, the background common law rule generally recognized the immunity of former officials for actions taken in an official capacity. See, *e.g.*, VCDR art. 39(2), 23 U.S.T. at 3245; pp. 11-12, *supra*. That rule reflects the principle that functional immunity "based on acts—rather than status—does not depend on tenure in office." *Matar*, 563 F.3d at 14. As a general matter, affording immunity to former officials for matters within their official capacity serves the important purposes of protecting the reciprocal interests of sovereigns, ensuring that officials are not unduly chilled in the performance of their duties, and preventing litigants from circumventing the FSIA's stringent limitations on suit against the state through suits against its former officials. *Belhas* v. *Ya'alon*, 515 F.3d 1279, 1286 (D.C. Cir. 2008); *Chuidian*, 912 F.2d at 1101.

Accordingly, nothing in the FSIA should be read to establish a scheme in which current officials, but not former officials, could enjoy immunity. Congress surely did not intend to depart from established domestic and international practice in so dramatic a manner. That is especially so given the requirement that Congress speak clearly when it intends to change settled common law principles. See *Texas*, 507 U.S. at 534. Nor would such abrogation be consistent with the understanding that one of Congress's "well-recognized" purposes in enacting the FSIA was the "codification of international law [of immu-

nity] at the time of the FSIA's enactment." *Permanent Mission*, 551 U.S. at 199.

2. If the Court concludes that foreign officials are "agenc[ies] or instrumentalit[ies]" of the foreign state, 28 U.S.C. 1603(b), the immunity of former officials should continue to be governed by the common law regime, guided by executive judgment, that predated the FSIA. The court of appeals held that were foreign officials considered "agenc[ies] or instrumentalit[ies]," individuals no longer employed by the foreign state at the time of the suit's filing would not be entitled to immunity under the FSIA. Pet. App. 21a-25a. In so concluding, the court relied on this Court's decision in *Patrickson*, which held that because the majority-share-ownership prong of Section 1603(b)'s definition of an "agency or instrumentality" is "expressed in the present tense," corporate entities that satisfied Section 1603(b)'s definition at the time of the acts in question but not at the time of suit fall outside of the FSIA's coverage. 538 U.S. at 478. Under the rationale of *Patrickson*, former officials likewise would no longer be agencies or instrumentalities of the foreign state. At that point, they should once again receive immunity (or not) under common law principles. Nothing in Section 1603(b) or any other provision of the FSIA indicates any intent to abrogate common law immunity for former officials. See *Matar*, 563 F.3d at 13 ("[t]he FSIA is a statute that 'invade[d] the common law' and accordingly must be 'read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.'") (citation omitted); *id.* at 14. Accordingly, the Second Circuit has held that "if * * * the FSIA does not apply to former government officials," such officials may be "immune from suit under common-law principles

that pre-date, and survive, the enactment of that statute." *Ibid.*

Under the "agency or instrumentality" theory of the FSIA's application to individuals, petitioner's status as a former official removes him from the FSIA and returns him to the world of common law principles of immunity. In that event, as noted earlier, the remand ordered by the court of appeals will allow the district court to determine in the first instance whether petitioner is immune from this suit. See p. 28, *supra*.

3. Should this Court instead adopt petitioner's alternative theory and conclude that the term "foreign state," see 28 U.S.C. 1603(a), covers foreign officials, the Court's construction would apparently apply to former as well as current officials. The very reason for including individual officials within the term "foreign state" presumably would have to do with the relationship between the acts of the official and the acts of the state. If so, the state's immunity would extend to all acts in an official capacity, even when the individuals who committed them no longer hold office. See *Matar*, 563 F.3d at 14. Accordingly, this theory would work an even greater invasion of the pre-existing common law than would petitioner's first theory, and for this reason alone should be rejected.

If the Court concludes otherwise, however, the question still remains under the FSIA whether petitioner acted in an official rather than a personal capacity. See p. 23, *supra*. A remand to the district court to make that determination would therefore be required.[12]

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[12] As noted previously, the district court relied upon letters from the TFG stating that the actions alleged in the complaint "would have been taken by [petitioner] in his official capacities." See Pet. App. 54a-55a, 57a, 61a. But the United States does not recognize the TFG as the government of Somalia, and absent contrary guidance from the Executive

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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Branch, the TFG is not in a position to assume that role in United States courts. The district court therefore should not attach significance to the statements of the TFG unless the Executive Branch advises it to do so.

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MOHAMED ALI SAMANTAR,
Petitioner,

v.

BASHE ABDI YOUSUF, *ET AL.*,
Respondents,

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

Brief of *Amici Curiae* Academic Experts in Somali History and Current Affairs in Support of Respondents

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Brief of *Amici Curiae* Academic Experts in Somali History and Current Affairs in Support of Respondents

Professors Lee Cassanelli, J. Peter Pham, Ioan M. Lewis, Gerard Prunier, and Hussein Bulhan, academic experts in the history and current affairs of Somalia, respectfully submit the following Brief as *Amici Curiae* in support of Respondents herein, urging the Court to affirm the decision of the U.S. Court of Appeals for the Fourth Circuit. Counsel for Petitioner and Respondents have both consented to the filing of this Brief.[1]

Interest of *Amici*

Amici are professors whose academic specialties include the history and current affairs, including the politics and legal systems, of the Horn of Africa, and of Somalia in particular.

Dr. Lee Cassanelli is Associate Professor of African history, oral history, and comparative world history at the University of Pennsylvania in Philadelphia. His research interests focus on Ethiopia and Somalia from the 18th to the 20th century. He has co-edited a book on some of the social and economic forces behind the Somali civil war (Catherine Besteman and Lee V. Cassanelli, eds., *The Struggle for Land in Southern Somalia: The War Behind the War*, Westview Press, 1996),

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[1] Undersigned counsel of record, in collaboration with the named *Amici*, is the sole author of this Brief. The law firm of which counsel is a shareholder paid for its printing and submission. Neither party, nor any law firm representing a party, made any monetary contribution to it.

and is author of *The Shaping of Somali Society* (Univ. of Penn. Press, 1982) and *Victims and Vulnerable Groups in Southern Somalia*, for the Canadian Immigration and Refugee Board, Ottawa, 1995.

Dr. J. Peter Pham is Senior Fellow and Director of the Africa Project at the National Committee on American Foreign Policy in New York City. He also holds academic appointments as Associate Professor of Justice Studies, Political Science, and African Studies at James Madison University in Harrisonburg, Virginia, and as nonresident Senior Fellow in Africa Policy Studies at the Foundation for the Defense of Democracies in Washington, D.C. He writes "Strategic Interests," a weekly column on African security issues distributed by the World Defense Review, including the article "Somalia: Strategic Realities and Realistic Stratagems,"[2] and has authored more than fifty chapters in edited volumes, articles in refereed journals, and other commentaries on political and security developments in Somalia. Dr. Pham has testified before the U.S. Congress on numerous occasions and conducted briefings for or consulted with the U.S. and foreign governments as well as private firms about his area of specialty. Dr. Pham is Vice President of the Association for the Study of the Middle East and Africa (ASMEA), and is Editor-in-Chief of its new flagship publication, The Journal of the Middle East and Africa.

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[2] This article is available at http://worlddefensereview.com/pham070209.shtml.

Dr. Ioan M. Lewis is Professor Emeritus of Anthropology at the London School of Economics, and has studied Somali culture and politics since the 1950s. He is the author of numerous works on Somalia, including: *Understanding Somalia and Somaliland: Culture, History, Society* (Columbia University Press 2008), *Modern History of the Somali: Nation and State in the Horn of Africa* (Ohio University Press 2003), and *Making History of Somalia: Humanitarian Intervention in a Stateless Society* (Centre for the Study of Global Governance, London School of Economics 1995), among others.

Dr. Gerard Prunier is Research Professor Emeritus at the University of Paris, specializing in the Horn of Africa as well as Central and East Africa. In 1984, he joined the Centre National de la Recherche Scientifique (CNRS) in Paris, where he continues to serve as Senior Researcher. Dr. Prunier has done extensive research on Eastern Africa and the Horn of Africa, publishing approximately 120 articles and five books over the past 18 years. He is the author of, among many other works, "The Experience of European Armies in Operation Restore Hope," in Clarke and Herbst, *Learning From Somalia* (Westview Press 1997), and "Somalia: Civil War, Intervention and Withdrawal 1990-1995," 15 UNHCR Refugee Survey Quarterly (1996).

Dr. Hussein Bulhan is President of the University of Hargeisa in Somaliland, and is the former head of the Somaliland Academy for Peace and Development. Dr. Bulhan served as a tenured professor at Boston University and as Director of the Family Therapy Program at Boston University

Medical Centre. He returned to Somaliland to mediate conflict in 1994 to 1996, thereafter remaining in the country to help in socio-economic rebuilding and trauma treatment. He is the author of, inter alia, *Politics of Cain: One Hundred Years of Crises in Somali Politics and Society* (Tayosan International Publishing 2008).

Amici note that, in the case at Bar, Petitioner has made certain representations concerning the recent history and current status of Somalia that are inconsistent with their own observations and understanding of the facts on the ground in that country.[3] In particular, Petitioner suggests: (1) that atrocities against civilians, including the widespread and systematic use of torture and extrajudicial killing of which Petitioner is accused, were taken within his official authority under Somali law at the time of the events giving rise to this case (*see, e.g.*, Petitioner's Brief at 17), and (2) that the Transitional Federal Government of Somalia ("TFG") is currently a functioning government that administers the territory of Somalia, provides services to its citizens, and has received the official recognition of the United States (*id.* at 43-45).

These contentions are entirely at odds with the views of *Amici*, with the academic research with which they are familiar, and with their own experience, observations, and field studies. *Amici* respectfully submit that the Court's deliberations

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[3] The facts set out in this Brief are supported by reference to academic literature and other sources. Facts stated without citation to authority are based on *Amici*'s own experience, personal observations, and field research.

may be aided by their disinterested perspective on conditions in Somalia at the time periods relevant to this case.

Summary of the Argument

The Siad Barre regime in Somalia – in power from 1969 through 1991 – was a brutal dictatorship, which preserved its hold on power through nepotism, the repression of disfavored ethnic groups, and systematic violations of the rights of those who opposed its excesses. Although the regime's constitution pledged respect for internationally-recognized human rights, that commitment was never honored, and there was no independent judiciary to which the victims of these abuses could turn for recourse. The failure of the Siad Barre regime to honor its international obligations earned it condemnation from countries around the globe, including the United States.

Petitioner Mohamed Ali Samantar was Defense Minister and then Prime Minister under that regime, and in that capacity was instrumental in implementing its policies of torture, summary executions, disappearances, and the rampant denial of fundamental principles of the due process of law. The military and national security forces were the instruments of these policies, and were employed for political ends.

When the Siad Barre regime fell, Somalia ceased to exist as a functioning state. To this day, no governing authority has been able to acquire either de jure or de facto control over the territory of the country. The so-called "Transitional Federal

Government," currently claiming to be the government of Somalia is not in fact a functioning government at all, does not control substantial territory, and is not recognized by the United States. Indeed, the existence of at least two substantial separatist entities that have created some of the institutions of governments suggests that the territorial integrity of the former Republic of Somalia is by no means assured.

Argument

I. The Siad Barre Regime, in Power in Somalia at the Time of the Events Giving Rise to This Case, Was a Military Dictatorship, Responsible for Widespread and Systematic Atrocities against Civilians, Including Torture and Extrajudicial Killing.

A. *Background to the Siad Barre Regime*

The Somali Republic was formed as a union between the former British Somaliland Protectorate, which became independent on June 26, 1960, as the "State of Somaliland," and the Italian Trust Territory of Somalia, which achieved independence five days later. The referendum to establish the union was boycotted by several political parties (predominantly representing the Isaaq clan), who feared that politicians from the southern part of the country would dominate the new government. In December 1961, some Sandhurst-trained officers in the recently integrated National Army, hailing from the north, attempted a coup. While the rebellion was quickly put down, many northerners continued

to feel economically and politically marginalized by the government in Mogadishu. An Isaaq (Mohamed Ibrahim Egal) ultimately became Prime Minister in 1967, but he did not remain in office long: he was detained following the military coup of 1969 and remained in custody until 1975.

During the 1960s, the Somali police force was trained by U.S. and European advisers, while the National Army was trained and equipped by the Soviet Union. Both forces at that time enjoyed relatively strong reputations for discipline and integrity. The 1961 Constitution provided for an independent judiciary, incorporating elements of British, Italian, and Shari'a legal codes, with a Supreme Court to decide on matters which overlapped customary, statutory, and Islamic law.

B. *The Military Coup d'État and Siad Barre's Consolidation of Power*

The assassination of President Shermarke in September 1969, purportedly in retaliation for local clan killings during the national elections earlier that year, was followed by a military coup d'état a month later. A ruling Supreme Revolutionary Council (SRC) suspended the Constitution, banned all political parties, and selected Mohamed Siad Barre as its titular president and spokesman. Siad Barre soon emerged as a strongman, and in 1970 proclaimed "scientific socialism" to be the guiding ideology of the country, which he renamed "the Somali Democratic Republic." Relations with the West deteriorated as the Soviet Union and its

Eastern European allies became the major backers of the new regime.

In 1972 Somali became a written language (using Latin script) and thus the official national language, and self-help and literacy campaigns were launched throughout the country. At the same time, Siad Barre began to strengthen his regime's power while steadily undermining potential sources of opposition. In addition to building an elaborate intelligence and security apparatus (which is discussed further below), he also promulgated laws which increased the state's control over property rights, the court system, and local governance. The effect was to weaken the public authority of clan elders, Islamic clerics, and civil service bureaucrats.

The regime overhauled local government, as part of a long-range decentralization program intended to destroy the influence of the traditional clan assemblies and, in the government's words, to bring government "closer to the people." It broke up the old geographic regions into smaller units: local councils, composed of military administrators and representatives appointed by the SRC, were established under the Ministry of Interior at the regional, district, and village levels to advise the government on local conditions and to expedite implementation of its directives.

The early 1970s also witnessed the establishment (under Soviet direction) of the National Security Service (NSS).[4] Its initial aims

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[4] National Academy of Science, Human Rights Committee, Scientists and Human Rights in Somalia (1988) ("NAS

were to halt the flow of professionals and dissidents out of the country and to counteract the settlement of disputes among the clans by traditional means. The newly-formed Ministry of Information and National Guidance set up local political education bureaus to carry the government's message to the people, sent civil servants for retraining sessions at "reorientation centers" like "Halane," and used Somalia's print and broadcast media to promote "scientific socialism." A censorship board, appointed by the ministry, tailored information to SRC guidelines. In addition to targeting nepotism and tribalism, the system also harassed and incarcerated individuals for "lack of revolutionary zeal," utilized arbitrary powers of arrest, and exercised surveillance over public servants.

In its 1989 report on Somalia, Africa Watch asserted that "extreme and systematic oppression" of political opponents had dated from the start of the Siad Barre years,[5] although I.M. Lewis writes that in these early years "few political prisoners were brutally tortured or died in custody."[6] As early as 1973, however, some Western-educated intellectuals had begun to flee the country. Several high-profile public executions also occurred: Army Generals Mohamed Ainanshe and Salal Gavere in 1972, and ten local sheikhs in January 1975. The latter event was a response to Islamic clerical criticism of the

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Report"), p. 16, describing the NSS as "an intelligence agency with virtually unlimited powers of surveillance, investigation, search, arrest, and detention."

[5] Africa Watch, *Somalia: A Government at War with Its Own People* (1989) (hereinafter "Africa Watch"), p. 7.

[6] I.M. Lewis, *A Modern History of Somalia*, p. 212.

regime's 1974 Family Law, which took decisions on inheritance and divorce out of the traditional Islamic courts and made the state the ultimate arbiter of such matters. The 1975 executions marked the start of a major rift between Somali religious scholars and the state. Many experts locate the origins of the modern Islamist movement in Somalia in this period.

With Soviet encouragement, a Somali Revolutionary Socialist Party (SRSP, or XHKS in the Somali language) was established in 1976, headed by a Supreme Council which included civilians. In theory the creation of the SRSP marked the end of military rule, but in practice, real power over the party and the government remained with the small group of military officers who had been most influential in the SRC. Decision-making power resided with the new party's politburo, which was a select committee of the Supreme Council made up of five former SRC members, including Siad Barre, NSS chief Ahmad Suleiman Abdullah (the President's son-in-law), and Defense Minister Mohamed Ali Samantar (Petitioner in the case now before the Court). Military influence in the new government increased with the assignment of former SRC members to additional ministerial posts, and with the appointments of military officials to district and regional governments.

In August 1977, the Soviet Union suspended arms shipments to Somalia and accelerated military deliveries to the emerging Marxist government in Ethiopia, which was combating Somali troops seeking to liberate the Ogaden region. Somalia, in turn, renounced its Treaty of Friendship and Cooperation with the USSR, and expelled all Soviet

advisers. For the next decade, Somalia received most of its foreign military and economic assistance from the United States and its Western allies.

C. *Increasing Repression after 1975*

The regime's repressive policies and practices continued after Somalia broke its ties with the Soviet Union in 1977 and became a major recipient of Western military and economic assistance. The disastrous Ogaden War of 1977-78 produced widespread dissent within the ranks of the Somali National Army. Officers from the Majerteen (Darod) and Isaaq clans in particular felt that their troops had borne the brunt of the conflict and suffered the greatest casualties while the President's clansmen (the Marehan) had stood on the sidelines. Their opposition to the handling of the war threatened the stability of the regime, which retaliated immediately. Africa Watch reported that in 1978, "about 80 officers were executed in Hargeisa," and a coup led largely by Majerteen officers in April of that year was crushed by the government.[7]

Through the 1980s, the Siad Barre regime increasingly used arrests, detentions, and executions of dissidents from all clans to suppress political opposition, as annual U.S. State Department reports on Somalia country conditions regularly noted. The regime also faced a number of clan-based opposition movements, which operated from base camps in Ethiopia and launched periodic raids against government installations in Somalia. The major opposition organizations were the Somali Salvation

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[7] Africa Watch, pp. 28-29.

Democratic Front (SSDF), made up primarily of Majerteen clansmen from the northeast, and the Isaaq-dominated Somali National Movement (SNM), which targeted government officials and their agents in the northwest. The regime retaliated with punitive raids against civilian communities in those two parts of the country, a form of "collective punishment" which would be later employed in the regime's 1988 bombing of Hargeisa and other northern towns.[8] During the 1980s, other practices reflecting the regime's arbitrary and systematic repression of opponents became routine. The National Security Service's headquarters at "*Godka Muqdisho*" ("the hole"), and maximum security prisons at Lanta Bur and Labaatan-Jirow (built by the East Germans, and featuring underground solitary confinement cells), became known as centers of abuse and torture of political opponents.

After 1975, critical ministries and security posts were almost exclusively entrusted to close relatives or in-laws of Siad Barre. From 1969 to 1981, the head of the National Security Service was his son-in-law Gen Ahmed Suleiman Abdulle. Another son-in-law, Abdirahman "Gulwade," headed "the Victory Pioneers," a paramilitary group which reported directly to the President and had powers of arrest and detention. The regime also employed individuals from low-status "minority" groups whose power came not from their clan affiliation but solely from their loyalty to the President. Petitioner Mohamed Ali Samantar, Defense Minister from 1980 to 1987 and Prime Minister from 1987 to 1990, was

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[8] *Id.*, pp. 29-34; Bradbury, *Becoming Somaliland* (Oxford: James Curry, 2008), pp. 43-44

the highest-ranking member of the Siad Barre government to come from one of the minority groups.

Through the 1980s, political and military power was concentrated in the hands of three clans – the Marehan, Ogaden, and Dulbahante – popularly known as "the MOD coalition." Representatives of other clans were not totally excluded from the government, but they tended to hold less sensitive portfolios and were watched carefully by the NSS and other intelligence networks. Members of clans with armed opposition movements based in Ethiopia or the Middle East (such as the Isaaq) were kept under constant surveillance by the security apparatus in Mogadishu and elsewhere in the country.

Following the Ogaden War, the government systematically resettled Ogaden refugees in camps and settlements in the northwest (Isaaq-dominated) region and supplied them with weapons – in contravention of international refugee law[9] – to help suppress the Isaaq and seize their economic assets. When the Isaaq retaliated, government security forces arrested, detained, and frequently tortured Isaaq civilians. The "*tabaleh*" system, applied only in the Northwest region, employed informants to track the travels of Isaaq businessmen and educators and to monitor visitors to Isaaq households. Africa Watch documents house-to-house searches, extrajudicial executions, and killings of Isaaq civilians in the 1980s.[10] Prominent Isaaq

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[9] Somalia became a party to the 1951 Convention Relating to the Status of Refugees and its 1967 in 1978.

[10] Africa Watch, pp. 49-81.

professionals in Mogadishu and elsewhere were also harassed or detained.[11]

Responsibility for maintaining security in the northwest region was in the hands of military governors throughout the 1980s, the best-known being Mohamed Hashi Gani (a cousin of Siad Barre) and Mohamed Siad Hirsi "Morgan" (the President's son-in-law). The region was put under a "state of emergency" in 1982, and Mobile Military Courts (MMCs) were established to provide summary justice. The HANGASH, a military police force operating independently of the NSS, provided evidence to help the MMC prosecutor prepare charges against suspected dissidents. Suspects were often imprisoned at *Qaybta*, the headquarters of the military command for the northwest region, where torture and the threat of torture were used not only to extract information about the SNM or potential defectors from the NSS, but also to extort money from prisoners or their families. In the rural areas, a mechanized unit of the army made up exclusively of non-Isaaqs and popularly known as *dabar-goynta Isaaqa* ("the Isaaq exterminators") terrorized the nomadic populations for their reputed support of the SNM.[12]

By 1987, disaffection with the regime had become widespread in Somalia, and rifts were apparent even within the ruling clique. When a segment of the Ogaden clan broke from the

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[11] Jama Mohamed Ghalib, *The Cost of Dictatorship: The Somali Experience* (New York: Lilian Barber Press, 1995), pp. 159-181.

[12] Africa Watch, p. 89.

government to launch its own opposition group (the Somali Patriotic Movement, or SPM), and leaders of the previously quiescent Hawiye clan formed the Somali National Alliance (SNA), the regime had lost control of most of the country.

The anticipated loss of sanctuaries in Ethiopia following the Ethiopia-Somalia peace agreement in May 1988 prompted the SNM to launch attacks against government installations in Hargeisa and Bura'o, the northwest region's two largest cities. The Somali Armed Forces in June and July 1988 retaliated in a massive campaign of aerial and ground assaults on cities and towns in northwest Somalia. The aerial bombing of Hargeisa were one of the most bizarre war crimes in the annals of armed conflict: taking off from that city's own airport, the aircraft destroyed public buildings, the marketplace, and several residential areas, with no effort to distinguish between civilians and armed combatants. Livestock was confiscated and wells were poisoned. Africa Watch estimated that fifty to sixty thousand civilians were killed between May 1988 and March 1989, and some 400,000 civilians (predominantly Isaaq) fled to Ethiopia as refugees.[13] In the early 1990s, land erosion revealed the existence of mass graves on the outskirts of Hargeisa, suggesting the systematic execution of local Isaaq residents by government forces.[14]

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[13] *Id.*, p. 3.

[14] "Forensic Report: Preliminary Assessment of Mass Graves in the Vicinity of Hargeisa, Somalia," U.N. Economic and Social Council, Commission on Human Rights, E/CN.4/1999/103/Add.1 (Nov. 1998).

In late 1990, a loose alliance of opposition militias moved to seize the capital, Mogadishu, and in January 1991 Siad Barre and his presidential guard were forced to flee. When leaders of the various opposition factions could not agree on who should be the new President, the state collapsed, and civil war ensued.

D. *The Lack of Legal Recourse for Victims of Human Rights Abuses during the Siad Barre Regime*

The legal system functioned after the 1969 coup, albeit not as it had before. Before 1969, the Higher Judicial Council had had responsibility for the selection, promotion, and discipline of members of the judiciary. The Council had been chaired by the president of the Supreme Court and included justices of the court, the attorney general, and three members elected by the National Assembly. After the coup, military officers assumed all positions on the Higher Judicial Council. The effect of this change was to make the judiciary accountable exclusively to the Siad Barre regime.

In addition, in 1970, special tribunals, the National Security Courts (NSC), were set up as the judicial arm of the Supreme Revolutionary Council. Using a military attorney as prosecutor, the courts operated outside the ordinary legal system to address activities considered to be counter-revolutionary.[15] The first cases to come before the courts involved the Shermarke assassination, as well as charges of corruption leveled by the SRC against

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[15] The NAS Report correctly noted that most members of this "court" "have little or no training in legal matters." P. 17.

members of the democratic regime (including former Prime Minister Egal). The NSC subsequently heard cases with and without political content. Judges of the NSC were appointed by President Siad Barre, and its Special Prosecutors were invariably members of the Armed Forces under the President as Commander in Chief. No appeal could be taken against their decisions.

Law No. 54, entitled "Law for Safeguarding National Security," was enacted by the Siad Barre regime in September 1970. It defined a wide range of political offenses against the unity and security of the country. Subsequent measures authorized government officials to search homes and detain suspects without a warrant, denied the right to a lawyer to detainees upon arrest, permitted the use of forced confessions as evidence, and abolished *habeas corpus.*[16]

After 1973, the regime extended the death penalty and prison sentences for individual offenders. And although civil rights were nominally guaranteed in the 1979 Constitution – promulgated by the regime in an effort to secure aid from Western countries – they remained subject to the existing national security legislation, which remained in effect until the collapse of the state in 1990-91.[17]

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[16] Africa Watch, pp. 16-21; Andre Le Sage, *Stateless Justice in Somalia* (Geneva: Center for Humanitarian Dialogue, 2005) (hereinafter, *Stateless Justice*), p. 20.

[17] The 1979 Constitution remained in effect until 1991. It contained many commitments to human rights, including the pronouncement I Article 19 that, "The Somali Government shall recognize the Universal Declaration of Human Rights and generally accepted rules of international law." Article 25

During the Siad Barre years, national security laws provided victims of the regime's systematic and widespread human rights abuses no legal recourse within the country. The laws were enacted, enforced, and administered by agents of the regime, and the courts nominally responsible for interpreting those laws and offering redress for their violation were also dominated by the regime's appointees. According to a leading expert on the Somali legal system, "by 1987, the Supreme Court existed in name only; the president of the court, appointed by Siad Barre, was deemed corrupt if not incompetent; and the two courts of appeal were no longer functioning."[18] There was no sense of democratic accountability in any branch of the government. It is inconceivable that, during those years, a Somali citizen could have had an opportunity to complain before any court that he had been tortured by representatives of the state, or that his property had been taken by them without due process of law. And even had it been possible to obtain an audience to level such charges, there was no possibility that a regime-installed judge would have condemned his employer, much less ordered it to offer any kind of reparation.

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forbade extra-judicial killings, while Article 26 prohibited arbitrary detention and promised recognition of the due process of law. Thus the very acts of which Samantar stands accused in this action were violations not only of Somali law, but of the country's Constitution then in force. Yet there can be no doubt that torture was widespread during the regime's years in power. *See, e.g.*, NAS Report, pp. 32-37.

[18] Martin R. Ganzglass, "The Restoration of the Somali Justice System," in Walter Clarke and Jeffrey Herbst, eds., *Learning from Somalia* (Boulder: Westview Press, 1997), p. 21.

The abandonment of "scientific socialism" by the regime in 1988 did little to separate judicial authority from the executive branch of government. "Corruption and repressive practices were rife. The legacies of Siad Barre's rule remain to this day, including public perceptions that the judiciary system is a tool in the hands of governing elites and their clan patrons to promote personal interests, repress opposition leaders and groups, dispossess non-governing clans and non-elites of their land and property, and otherwise dominate other clans." [19]

The Siad Barre years were a time in which there was no rule of law in Somalia, which was administered instead by a brutal and closed dictatorship. After the fall of that regime, however, Somalia experienced a transition not into another kind of government, either more benign or more abusive. The narrative of the next chapter in Somalia's history, beginning in 1991, is the passage into near-complete anarchy.

II. Current Conditions in the Territory of Somalia Bespeak the Lack of a Functioning Government, and No Entity Is Recognized by the United States as the Government of Somalia.

A. *Introduction*

Somalia is often described in popular media as "the only country in the world where there is no government."[20] Instead, it has been characterized by

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[19] *Stateless Justice*, pp. 20-21.

[20] BBC News, "Living in Somalia's Anarchy," November 18, 2004, http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/4017147.stm.

"a long-running, multisided battle for control"[21] by heavily armed fighters representing "a tangled web of clans and militias."[22] However superficially appropriate the designation "failed state" may be for what was once the Somali Democratic Republic, it does not do justice to the complex realities on the ground. In fact, what many journalists refer to as "Somalia" in their lurid accounts of the struggle for resources and power is really only the central and southern parts of the former national territory. In assessing the reality of conditions in "Somalia," it is more accurate to consider that for all intents and purposes, that term today embraces at least three distinct political spaces – central and southern Somalia, "Puntland" in the northeast, and "Somaliland" in the northwest – as well as several smaller enclaves.

B. *The "Transitional Federal Government"*

The current "Transitional Federal Government" (TFG) of Somalia is the **fifteenth** attempt at reconstituting a central government for the country since the collapse of the Siad Barre regime in January 1991. The origins of the current TFG can be traced to its immediate predecessor, which came about through a lengthy process sponsored by the sub-regional organization, the Intergovernmental Authority on Development (IGAD). That process, known as the Mbagathi (or

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[21] Eugene Robinson, "Down the Wrong Path in Afghanistan," *Washington Post*, December 4, 2009.

[22] Abdinasir Mohamed and Sarah Childress, "Suicide Bombing Kills Somali Ministers, Students," *Wall Street Journal*, December 4, 2009.

Nairobi) peace talks, lasted from 2002 until 2004. It resulted in the creation, in late 2004, of a five-year interim administration under Abdullahi Yusuf Ahmad, then-President of the Puntland region. While the establishment of the TFG was welcomed by parts of the international community, the regime never succeeded in gaining acceptance within the country and, in fact, did not establish a presence in Mogadishu until early 2007, when it entered in the wake of an Ethiopian military intervention.[23]

Increasingly isolated even within the TFG, and facing a mounting Islamist insurgency, Yusuf resigned at the end of 2008. To replace him, the United Nations Secretary-General's Special Representative for Somalia manipulated the process, doubling the size of the TFG parliament (although there was no authority in the interim charter to do so), in order to install as president in January 2009 a supposedly "moderate" Islamist, Sheikh Sharif Sheikh Ahmed, previously chairman of the Islamic Courts Union, which had been overthrown by the Ethiopian intervention. The enlarged parliament, now numbering some 550 members, also extended its own term of office, due to expire in 2009, by two years.[24]

Birthed in circumstances that lacked democracy, transparency, or legitimacy, the TFG not surprisingly has struggled, rather unsuccessfully, to

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[23] *See* Ken Menkhaus, "The Crisis in Somalia: Tragedy in Five Acts," 204 *African Affairs* 357-390 (July 2007).

[24] *See* J. Peter Pham, "Somalia Stumbles along with Sharif," *World Defense Review*, February 19, 2009, http://worlddefensereview.com/pham021209.shtml.

gain acceptance within Somalia. Within a short time, increasingly frustrated by their lack of traction and faced with a renewed insurgency, Sharif Ahmed and members of the TFG took increasingly frequent trips abroad and essentially gave up on efforts to govern even the small enclave within Mogadishu where the African Union Mission in Somalia (AMISOM) peacekeeping force provided them with protection. The TFG's parliament, in fact, has not convened since April 2009, for want of a quorum.[25]

As of January 2010, despite the presence of an AMISOM force of more than 5,000 troops, the TFG operates in not even half of the 16 districts of the capital city. Outside Mogadishu, most of central and southern Somalia is in the control of the Islamist insurgency led by the *Harakat al-Shabaab al-Mujahideen* ("Movement of Warrior Youth," al-Shabaab), a group named a "Specially Designated Global Terrorist" by U.S. Secretary of State Condoleezza Rice in 2008[26] and a "listed terrorist organization" by the Australian government the following year,[27] and its allies in the *Hisbul Islam* ("Islamic party") movement led by Sheikh Hassan

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[25] *See* Abdiaziz Hassan, "Somali Legislators Flee Abroad, Parliament Paralysed," Reuters, June 24, 2009, http://uk.reuters.com/article/idUKLO890231.

[26] U.S. Department of State, Office of the Coordinator for Counterterrorism, "Designation of al-Shabaab as a Specially Designated Global Terrorist" (Public Notice 6137), February 26, 2008, http://www.state.gov/s/ct/rls/other/des/102448.htm.

[27] Commonwealth of Australia, Joint Media Release of Attorney-General Robert McClelland MP and Minister for Foreign Affairs Stephen Smith MP, "Listing of Al-Shabaab as a Terrorist Organisation," August 21, 2009, http://www.foreignminister.gov.au/releases/2009/fa-s090821.html.

Dahir 'Aweys, whose name appears on both U.S. and U.N. antiterrorism sanctions lists. Meanwhile, the insurgents go about their strategy of encircling the transitional regime in Mogadishu by adding dominance in the central regions of Hiraan, Galguduud, and southern Mudug to the control they have exercised since 2008 in regions south of the capital.

Furthermore, the forces outside Mogadishu that are resisting the Islamist insurgents, such as they are, are largely outside the control of the TFG. For example, the *Ahlu Sunna wal-Jama'a* (roughly, "Followers of the Traditions and Consensus of the Prophet Muhammad") militias opposing al-Shabaab in the central regions, consisting of units loosely organized on a clan basis and having roots in the Sufi brotherhoods of traditional Somali Islam, went so far as to organize their own 41-member parliament, complete with speaker and deputy speaker, in late December 2009.

In short, the TFG is not a government in any common-sense definition of the term. It effectively administers hardly any territory, and provides no services to the citizens who find themselves in the limited zones where it is even present. It has difficulty even protecting its own senior officials. In December 2009, three TFG ministers, as well as 16 other people, were killed while attending a graduation ceremony within the small enclave of Mogadishu thought to be still controlled by the beleaguered regime.[28] So irrelevant is the TFG that

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[28] *See* Stephanie McCrummen, "Bombing Kills 19 in Somali Capital," *Washington Post*, 4 December 2009.

one of its prominent supporters has conceded that while a victory in Mogadishu by the insurgency would constitute a major political setback, it would not appreciably worsen the security threat that already exists in Somalia.[29]

C. *"The Republic of Somaliland"*

The government of "the Republic of Somaliland" does not yet have formal *de jure* recognition from any state, but nonetheless has presided over remarkable progress in the more than a decade and a half since the northeastern region proclaimed the dissolution of its voluntary 1960 union with what was once the Somali Democratic Republic.

The modern political history of Somaliland begins with the establishment in 1884 of the British Somaliland Protectorate which, except for a brief Italian occupation during the Second World War, lasted until June 26, 1960, when the territory was granted independence.[30] Notification of the independence was duly communicated to the United Nations and some 35 members duly accorded the new state diplomatic recognition. Several days later, the Italian-administered UN trust territory of Somalia received its own independence. The two states then entered into a hasty union. Some legal scholars have always argued that the union fell short of the minimal standards for legal validity. In

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[29] *See* Ken Menkhaus, "Somalia: What Went Wrong?" 154 *RUSI Journal* 6-12 (August 2009).

[30] *See* I.M. Lewis, *The Modern History of Somaliland: From Nation to State* (New York: Frederick A. Praeger, 1965).

any event, the Somalilanders quickly regretted it, due in no small measure to the discrimination that the predominantly Isaaq northerners suffered at the hands of the numerically superior members of clans from other regions.[31]

After the collapse of the Siad Barre regime in 1991, elders representing the various clans in Somaliland met in the ravaged city of Burao and agreed to a resolution. They determined to annul the northern territory's merger with the former Italian colony, and declared that it would revert to the sovereign status it had enjoyed upon independence from Great Britain. Unlike other parts of Somalia, conflict in the region was averted when the Somali National Movement (SNM), the principal opposition group that had led the resistance against the Siad Barre dictatorship in the region, and Isaaq clan leaders purposely reached out to representatives of other clans in Somaliland, including the Darod/Harti, Gadabuursi, and Ise. The Burao conference appointed the chairman of the SNM, Abdirahman Ahmed Ali "Tuur," to be interim president of Somaliland for a period of two years. In 1993, the Somaliland clans sent representatives to Borama for a national *guurti*, or council of elders, which elected as president of Somaliland Mohamed Haji Ibrahim Egal, who had briefly been prime minister of independent Somaliland in 1960, as well as democratically elected prime minister of Somalia between 1967 and the 1969 coup. While the apportionment of seats at the two conferences was

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[31] *See* Anthony J. Carroll and B. Rajagopal, "The Case for an Independent Somaliland," 8 *American University Journal of Law and Politics* 653-662 (1993).

done along clan lines in a rough attempt to reflect the demographics of the territory, the actual decision-making was by consensus.[32]

Egal's tenure saw, among other things, the drafting of a permanent constitution, approved by 97 percent of the voters in Somaliland in a May 2001 referendum. This document established a government comprising an executive branch, made up of a directly-elected president and vice president and appointed ministers, a bicameral legislature consisting of an elected House of Representatives and an upper chamber of elders, and an independent judiciary.

After Egal's unexpected death in 2002, his vice president, Dahir Riyale Kahin, succeeded to the presidency, and was elected in his own right in a closely fought election in April 2003. The margin of victory for the incumbent was just 80 votes out of nearly half a million cast and, amazingly, the dispute was settled peaceably through the courts. Multiparty elections for the House of Representatives were held in September 2005, giving the president's party just 33 of the 82 seats, with the balance split between two other parties.

A 2005 African Union (AU) report concluded that "the fact that the union between Somaliland and Somalia was never ratified and also malfunctioned when it went into action from 1960 to 1990 makes Somaliland's search for recognition historically unique and self-justified in African

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[32] *See* Mark Bradbury, *Becoming Somaliland* (Oxford: James Currey, 2008), pp. 77-136.

political history." The report recommended that "the AU should find a special method of dealing with this outstanding case."[33] Yet despite this, no country has yet recognized Somaliland's independence. This apparent snub, while grating to Somalilanders, has not prevented them from building a vibrant polity with a strong civil society sector. While there were recent contretemps relating to the repeated postponement of presidential and legislative elections due to technical difficulties with registration, the disputes were ultimately resolved through an internal compromise worked out by all three of the region's political parties with encouragement from Ethiopia and the United Kingdom.

Left to their own devices, the Somalilanders found that the demobilization of former fighters, the formation of national defense and security services, and the extraordinary resettlement of over one million refugees and internally displaced persons fostered the internal consolidation of their renascent polity, while the establishment of independent newspapers, radio stations, and a host of local NGOs and other civic organizations reinforced the nation-building exercise. The stable environment thus created facilitated substantial investments by both local and diaspora businessmen who have built, among other achievements, a telecommunications infrastructure more developed and varied than what may be found in any of Somaliland's neighbors.[34]

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[33] African Union Commission, *Report of the AU Fact-Finding Mission to Somaliland* (April 30- May 4, 2005).

[34] *See* Iqbal Jhazbhay, *Somaliland: An African Struggle for Nationhood and International Recognition* (Johannesburg:

D. "The Puntland State of Somalia"

While they do not have the unique historical, juridical, and political status that Somaliland can claim, given its colonial history as a British protectorate and its brief post-colonial independence as a separate state, the Darod territories in the northeastern promontory of Somalia have also demonstrated the success of the building-block model for the country and the wisdom of working with the deeply ingrained clan identities. In 1998, tired of being held back by constant violence, and of the overall lack of social and political progress in central and southern Somalia, traditional elders of the Darod clan-family's Harti clan – including its Dulbahante, Majeerteen, and Warsangeli sub-groups – opted to undertake a regional state formation process of their own in the northeast. In collaboration with the SSDF, the political-military faction that had represented their clan interests, they established an autonomous administration for what they dubbed "the Puntland State of Somalia." After extensive consultations within the Darod/Harti clans and sub-clans, an interim charter was adopted which provided for a parliament whose members were chosen on a clan basis and who, in turn, elected a regional president. The first was Abdullahi Yusuf Ahmed who, in 2004, went on to become president of the TFG,[35] following which Puntland legislators

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South African Institute for International Affairs/Institute for Global Dialogue, 2009).

[35] *See* Kinfe Abraham, *Somalia Calling: The Crisis of Statehood and the Quest for Peace* (Addis Ababa: Ethiopian International Institute for Peace and Development 2002), 445-463.

chose General Mohamud Muse Hersi ("Muse Adde"), as the new head of the regional administration. After one four-year term of office, Muse Adde lost a bid for re-election to Abdirahman Mohamed Mohamud ("Farole"), elected in January 2009 from a field of over a dozen candidates.

Unlike Somaliland, which has opted for independence, the official position of Puntland has been to support the notion of a federal Somalia while upholding the region's claims to be able to negotiate the terms of union with any eventual national government. Puntlanders seem to be increasingly skeptical that a viable national regime will come into being anytime in the near future, and so have concentrated on internal efforts to establish their own governance structure. The most recent version of the constitution, unveiled in June 2009, was described by one international NGO as "mostly strong on human rights, with a good mix of checks and balances to prevent executive abuses and make government more accountable." It also "put Puntland firmly on the path towards secession."[36] In fact, when the prime minister of the TFG visited the region in August 2009, Puntland officials forced him to sign the "Galkayo Protocol," recognizing the region's autonomy and exemption from oversight on a range of security and political issues.

While Puntlanders have their share of difficulties – many of which (including the region's unsavory reputation as the center of maritime pirate activities as well as the burgeoning influence of the

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[36] *See* International Crisis Group, *Somalia: The Trouble with Puntland* (2009), http://www.crisisgroup.org/home/index.cfm?id=6264.

pirate syndicates in politics) are of their own making – the region has managed to avoid the violent conflict and extremism which has devastated central and southern Somalia.

E. *U.S. Policy toward the TFG and other Somali Polities*

Insofar as there can be said to be a consistent United States policy towards the TFG and other Somali polities, including the governments of the Republic of Somaliland and the "Puntland State of Somalia," it might be characterized as one of carefully balanced ambiguity.

On the one hand, Secretary of State Hillary Rodham Clinton and other senior U.S. diplomats have met with Sharif Ahmed and other TFG officials, both in the United States and abroad, publicly expressing support for the efforts of the Transitional Federal Government.[37] But on the other hand, while the United States never formally severed relations with Somalia after the collapse of the state in 1991, neither has it officially recognized any of the 15 transitional governments, including the current TFG. The State Department website merely recites: "The United States maintains **regular dialogue** with the TFG and other key stakeholders in

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[37] Secretary of State Hillary Rodham Clinton, Remarks after Meeting with President of Somalia Sheik Sharif Sheik Ahmed, August 6, 2009, http://www.state.gov/secretary/rm/2009a/08/126947.htm.

Somalia through the U.S. Embassy in Nairobi, Kenya."[38]

In fact, there has been no affirmative *de jure* recognition by the U.S. for the TFG. This is reaffirmed in the introduction by the Chairman of the House of Representatives Committee on Foreign Affairs, Subcommittee on Africa and Global Health, of a Congressional Resolution, H.Res. 859, in October 2009, urging "the Obama Administration to recognize the TFG and allow the opening of an official Somali Embassy in Washington."[39] This would hardly have been necessary were the TFG currently recognized as the government of Somalia.

It should be noted that the approach taken by the United States Government is in line with that taken by other nations, including some in the region that, from time to time, have voiced support for the TFG. The British Foreign and Commonwealth Office's website states: "Since the fall of the Siad Barre regime in 1991 there have been no formal diplomatic links between the UK and Somalia."[40] And the TFG's former foreign minister, Ismail Hurre Buba, and its defense minister, Yusuf Mohamed

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[38] U.S. Department of State, Background Note: Somalia, October 2009, http://www.state.gov/r/pa/ei/bgn/2863.htm#relations (emphasis added).

[39] H. Res. 859, http://thomas.loc.gov/cgi-bin/query/z?c111:H.RES.859: (the measure has been referred to committee for consideration).

[40] Foreign and Commonwealth Office, Country Profiles: Somalia, May 21, 2009, http://www.fco.gov.uk/en/travel-and-living-abroad/travel-advice-by-country/country-profile/sub-saharan-africa/somalia?profile=intRelations.

Siad, have been arrested in recent months in Kenya and Uganda, respectively,[41] demonstrating little deference to the TFG as the government of a neighboring country.

United States policy towards the Republic of Somaliland is likewise ambiguous. Officially, the U.S. does not recognize Somaliland's claim to separate statehood. But President Dahir Riyale Kahin, accompanied by Foreign Minister Abdillahi Mohamed Duale and several other cabinet members, visited Washington for eight days in January 2008 and were hosted at the Department of State, the U.S. Agency for International Development, the Department of Defense, and the National Security Council, among other United States Government offices. The State Department spokesman declared at the time: "This cordial and constructive visit demonstrated U.S. engagement with Somaliland in furtherance of our common interests in the areas of regional peace and security, economic development, and democratic reform."[42] Then-Assistant Secretary of State for African Affairs Jendayi Frazer then visited Hargeisa, the capital of Somaliland, in

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[41] *See* "Kenya Charges Muslim Activist over Hate-Cleric Riot," BBC News, January 19, 2010, http://news.bbc.co.uk/2/hi/africa/8468119.stm; *also see* "Somali Minister for Defense Arrested in Uganda," CBS News, October 7, 2009, http://www.cbsnews.com/stories/2009/10/07/ap/africa/main5368225.shtml.

[42] U.S. Department of State, Press Statement, "Visit of the Somaliland Delegation," January 20, 2008, http://2001-2009.state.gov/r/pa/prs/ps/2008/jan/99508.htm.

February 2008.[43] And her successor, current Assistant Secretary Johnnie Carson, received the Somaliland foreign minister at the State Department in July 2009.[44] The Obama Administration even returned Guantanamo detainees to Somaliland in December 2009, rather than risk sending them to the insecure conditions presided over by the TFG in Mogadishu.[45]

Likewise, President Abdirahman Mohamed Mohamud "'Farole" of the "Puntland State of Somaliland" spoke to the Africa Subcommittee of the House of Representatives identified by that proper title,[46] even after unveiling a constitution that clearly put the region on a secessionist footing.[47] The United States and a number of European governments have turned over captured pirates to the Puntland government.[48]

To summarize, events since 1991 corroborate the conclusion that the territory once known as the

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[43] Hussein Ali Nur, "Top U.S. Diplomat for Africa Meets Somaliland Leader," *Reuters*, February 3, 2008, http://www.alertnet.org/thenews/newsdesk/L03703531.htm.

[44] Somaliland Liaison Office, Press Release, "Ministerial Visit, July 13-24, 2009," July 28, 2009, http://www.awdalnews.com/wmprint.php?ArtID=11965.

[45] Jeremy Pelofsky, "U.S. Sends 12 Guantanamo Detainess to Home Countries," *Reuters*, December 20, 2009, http://www.reuters.com/article/idUSTRE5BJ0YJ20091220.

[46] *See* http://foreignaffairs.house.gov/hearing_notice.asp?id=1093.

[47] *See* J. Peter Pham, "Putting Puntland's Potential into Play," *World Defense Review*, September 24, 2009, http://worlddefensereview.com/pham092409.shtml.

[48] Oliver Hawkins, "What to do with a Captured Pirate," *BBC News*, March 10, 2009, http://news.bbc.co.uk/2/hi/7932205.stm.

Somali Republic has not had and does not now have a functioning government capable (not to say deserving) of recognition by the members of the international community. At least two of the component parts of the former Republic have broken away for all practical purposes, and the TFG, the supposed governing authority, cannot control even its own capital city. The TFG performs none of the functions normally associated with governments, and maintains none of the safeguards – such as a working judiciary – designed to protect the citizenry against its own excesses.

Conclusion

For all of the foregoing reasons, *Amici* respectfully represent to the Court that (1) the human rights abuses of which Petitioner is accused cannot have been taken within the scope of his "legal authority," since the Siad Barre regime operated entirely outside the rule of law, and (2) that the Transitional Federal Government of Somalia is not a functioning government and, notwithstanding any dealings which representatives of the United States may have with it from time to time, has never been and is not currently recognized as such by the United States as a matter of law or practice. *Amici* associate themselves with the arguments on the merits contained in Respondents' brief herein, and join in Respondents' request that the decision below be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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MOHAMED ALI SAMANTAR,

Petitioner,

v.

BASHE ABDI YOUSUF, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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AMICUS CURIAE BRIEF OF THE AMERICAN JEWISH CONGRESS IN SUPPORT OF PETITIONER

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AMICUS CURIAE BRIEF OF THE AMERICAN JEWISH CONGRESS[1]

INTEREST OF THE *AMICUS*

The American Jewish Congress ("AJCongress") is an organization of American Jews founded in 1918 to protect the civil, economic, political and religious rights of American Jews and all Americans.

The issue before the Court is whether disputes about official compliance with someone's vision of international law, including notoriously amorphous customary international law, arising out of disputes anywhere in the world, are fully justiciable in a private action for damages in the courts of the United States under the protean Alien Tort Claim Act. The live wars in Gaza, Lebanon, Sri Lanka, Chechnya and Indonesia and elsewhere will, under the decision below, be re-fought in front of American judges and juries to determine whether each and every military action taken in those wars was consistent with international law.

Our interest is, of course, Israel, which finds itself engaged in law-fare as well as warfare, courts around the world being another battlefield on which Israel finds itself engaged. There are legitimate international *fora* for criticizing Israel's actions.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

Absent Israel's consent, the courts of other nations are not that forum.

The question of whether officials enjoy the immunity of the state, the narrow question presented here, should not be decided only with regard to the independent and largely apolitical courts of the United States. If the Fourth Circuit's rule prevails, American officials who order remote targeted attacks, or are at the controls of a Predator missile launched at al-Qaeda or Taliban forces in Yemen, Afghanistan or Pakistan which also kills civilians,[2] could find themselves facing a civil action in any country which claims universal jurisdiction over violations of the law of war—say Iran, Venezuela or Libya—and pleas of immunity will be properly rejected on this Court's authority.

Because the decision of the court below misreads the Foreign Sovereign Immunities Act by isolating it from its international law matrix, AJCongress files this brief.

The parties have consented to the filing of this brief.

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[2] See *Pakistanis Confront Clinton Over Drone Attacks* (October 30, 2009), http://www.news.yahoo.com/s/ap/20091030/ap-on-re-as/as-clinton (last visited November 9, 2009).

SUMMARY OF ARGUMENT

1. The Foreign Sovereign Immunities Act (FSIA) was a codification of international law principles governing sovereign immunity. *Permanent Mission of India v. City of New York*, 551 U.S. 193 (2007). Congress wanted to shift the locus of sovereign immunity from domestic rules to compliance with international standards. The court below, however, looked only to the "language and structure" of FSIA, and ignored its international law context. It ignored as well the need to interpret federal statutes to be consistent with international law, *Murray v. Murray v. Schooner Charming Betsey*, 6 U.S. (2 Cranch) 64 (1804).

2. Sovereign immunity under both FSIA and international law is a firm rule of law, not a matter of comity—understood only as an international courtesy. *Permanent Mission, supra; Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 528 (1989).

3. International law mandates sovereign immunity because the international system is based, in the words of the UN Charter (Article II, § 1), on the "sovereign equality of all of its Members." That an equal has no dominion over an equal ("*Par in parem no habet imperium*") is a principle of law recognized by this Court as recently as last term in *Republic of Iraq v Beatty*, 129 S.Ct. 2183

(2009) and as long ago as *Schooner Charming Betsey*, 6 U.S. (2 Cranch) 64 (1804), by which time it was already a "venerable" principle.

4. An important application of the *par in parem* principle is that the courts of one state will not sit in judgment over the actions of another state, just as a court will not sit in judgment over the acts of state of another nation. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

5. Before and immediately after the adoption of FSIA, it was plain that sovereign immunity was available as a defense not only to states, but to their officials.

   The European Convention on State Immunity adopted in 1972 has a general rule of immunity with a list of exemptions—not including actions against officials. That Convention is regarded as declaratory of international law. *O'Muilleoir v. McDowell*, 2007 NIQB 108 (High Court of Justice, Northern Ireland).

6. The International Law Commission began working on a convention on "Jurisdictional Immunities of States" in 1977, only a year after adoption of FSIA. The rules it adopted—which "build on experience under the ... European Convention, as well as state practice ..." including FSIA, have been regarded by the House of Lords and the European Court of Humans Rights as authoritative expositions of

international law, even though they are not yet formally in force.

7. As adopted, the Articles on Jurisdictional Immunities explicitly include state officials under the protective umbrella of sovereign immunity (Article 2(b)(iv)). The explanatory note of the International Law Commission does not suggest anything but a codification of existing law. It observed: "Actions against such representatives or agents ...in respect of their official acts are essentially proceedings against the state they represent."

8. When the General Assembly approved the Articles in 2004 as based on "state practice" and "conventional practice" (A.Res./59/38), it noted that sovereign immunity was no bar to criminal prosecution of individual officials for violation of international law. It pointedly did not include civil actions to redress such actions as an additional unwritten exception to sovereign immunity.

9. The Articles were declared authoritative on this point in *Jones v. Saudi Arabia* [2006] UKHL 26, a suit brought against Saudi Arabia and its officials alleging torture, a violation of *jus cogens* human rights law. The defendants asserted sovereign immunity, and Jones challenged the availability of the defense.

Citing the UN Articles, and international case law dating to as early as the 19th century, the

House of Lords upheld the claim of immunity of government officers in a case alleging torture. It is not alone. Northern Ireland, Ireland, Germany, New Zealand, Canada (in several cases involving American officials), and the International Court for the Former Yugoslavia, have all taken the same position.

10. The result is no different in cases involving human rights claims, including those with *jus cogens* status. Although academics have asserted that international human rights claims stand at the top of the "normative hierarchy," and thus displace immunity defenses, this is not the law.

11. The normative hierarchy theory has been repeatedly rejected in the courts. This Court in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), a case involving a claim of torture, examined only the statutory FSIA exemption from immunity, and did not recognize a "normative hierarchy" exception for *jus cogens* violations. Numerous federal courts have reached the same conclusion.

12. The House of Lords likewise rejected this theory in *Jones*, *supra*. It quoted Hazel Fox' authoritative treatise on sovereign immunity (The Law of State Immunity (2004), at p. 525):

> "State immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict a prohibition contained in a *jus cogens* norm but

> merely diverts any breach of it to a different method of settlement. Arguably, then, there is no substantive content in the procedural plea of State immunity upon which a *jus cogens* mandate can bite."

13. The House of Lords relied in part on a similar decision of the European Court of Human Rights in *Al-Adsani v. United Kingdom* [2001] 34 EHRR 277, another torture case in which Kuwait was the original defendant. The British courts threw out the case on sovereign immunity grounds, and Al-Adsani challenged the ruling as denying him European treaty rights to access to court. The European court, relying, *inter alia*, on the UN's Jurisdictional Articles, found that human rights norms did not void claims of sovereign immunity.

14. The European Court (citing the decision of the House of Lords in the *Pinochet* case) acknowledged that immunity would not defeat a criminal prosecution, a holding reiterated the next year in an unpublished decision in *Kalogreopoulou v. Greece*.

15. The International Court of Justice, in *Armed Activities in the Congo* [2002] ICJ Report, ¶ 64, also held that an allegation of *jus cogens* violations did not supersede other valid restrictions on jurisdiction, such as those embodied in a Rwandan reservation to ICJ jurisdiction over questions arising under the

Genocide Convention. "[T]he mere fact that rights and obligations *erga omnes* may be at issue ...would not give the [International] Court jurisdiction.

16. The Italian high court in *Ferrini v. Federal Republic of Germany*, did reach an opposite result, but what amounts to an appeal of that decision is presently pending before the International Court of Justice.

17. There is no reason to think that Congress, in codifying international law in FSIA intended to depart from the majority rule, and as Professor Fox observes "risk creating total judicial chaos."

18. Recognizing sovereign immunity in civil cases leaves a wide range of remedies open to redress human rights violations, including criminal prosecutions, political and diplomatic sanctions and a denial of visas or refugee status.

19. A state (or group of states) contemplating a criminal prosecution for human rights violations must consider whether it would accept a similar prosecution being brought against its own officials. Civil actions can be brought by those interested only in punishing one side to a dispute, and in disregard of any valid state interests that might be at stake.

20. A rejection of a plea of sovereign immunity here will (a) induce parties to international conflicts to continue their warfare in the courts of the United States. A plethora of lawsuits here about

clashing claims of international law violations arising out of Israel's Operation Cast Lead in Gaza, for example, will embroil U.S. courts in seemingly endless disputes; (b) make American courts into a quasi-legislative body passing on a wide range of novel international law claims; and (c) serve as a precedent for trying those members of the U.S. serving in Afghanistan, Iraq and elsewhere in civil suits in foreign and often unfriendly third-party states.

ARGUMENT

I. THE FOREIGN SOVEREIGN IMMUNITIES ACT MUST BE INTERPRETED AGAINST AN INTERNATIONAL LAW BACKGROUND

The Foreign Sovereign Immunities Act ("FSIA") is the domestic embodiment of international law's insistence on adjudicative sovereign immunity. *Permanent Mission of India v. City of New York*, 581 U.S. 191, 199 (2007). Although FSIA is "a law of the United States, much of it codifies and applies international law as the United States views it." Restatement (3rd) of the Foreign Relations Law of the United States, Chapter V, Subsection A, at p. 395 (hereinafter "Restatement").

The House Judiciary Committee, in describing the background giving rise to FSIA noted that "sovereign immunity is a doctrine of international law under which domestic courts relinquish jurisdiction over a foreign state." H.R. Rep. 94-1487, at 3, 94th Cong., 2nd Sess. (1976), 1976 USSCAN 6604, 6607.

Given that FSIA codifies international law, it makes sense to interpret any ambiguities in that statute so that it remains consistent with international law, unless the statutory language inescapably compels a different result. This is particularly so because the House Report expressed an intent to return sovereign immunity law from a

domestic locus to a focus on the "law and practice of nations," H.R.Rep. 94-1487 at 3.

As relevant to this case, there are two arguable ambiguities in the statute: (1) FSIA does not explicitly address the question of whether state immunity attaches to individual officers acting on behalf of a state; and (2) FSIA does not in terms address whether immunity attaches to allegations of violations of international human rights rules, including those that have attained *jus cogens* status.

We address these questions by describing what international law has to say about them. In this regard, three points are essential: (1) immunity is a matter of law, not inter-state courtesy; (2) sovereign immunity extends to officials acting in an official capacity; and (3) there is no unwritten exception for favored human rights norms.

We do not address separately the impact of the Torture Victims Protection Act. ("TVPA") on the principles we lay out here.

A. The Court Below Wrongly Ignored the International Law Background of a Statute Intended to Codify International Law

In deciding whether public officials are within FSIA immunity when acting on behalf of their governments,[3] the court below approached the

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[3] This case presents no question of whether immunity would attach when an official engaged in internationally

question—on which the statute is literally silent—as an ordinary question of statutory interpretation, emphasizing that immunity is a matter of comity, not constitutional law. Placing chief emphasis on the statute's "language and structure," *Yousuf v. Samantar*, 552 F.3d 371, 380 (4th Cir. 2009), the court found that foreign public officials did not share their sovereign's FSIA immunity.

By emphasizing the here largely irrelevant dichotomy between constitutional law and comity, the court below ignored the fact that the comity on which sovereign immunity rests is not a bare question of goodwill, but a requirement of international law. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 409 (1964), citing in another context *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895) (comity is "neither a matter of absolute obligation ...nor of mere courtesy of goodwill").

It is true that sovereign immunity is not guaranteed foreign nations by constitutional text, but only by comity, *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). That fact is not dispositive here.

The invocation of comity in the FSIA context does not mean that international law does not require immunity. *Verlinden* held only that, for domestic law purposes, immunity was not a

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prohibited activity (torture) for a purely private purpose, *e.g.*, private sexual gratification.

constitutionally imposed limit on Article III jurisdiction, and hence that FSIA's exemptions from immunity did not exceed Congress' Article III powers. Nothing in *Verlinden* addresses the separate question of whether international law requires immunity or whether it is a matter of pure policy to be dispensed with when other policies appear stronger.

As to this question, unlike the question of enforcement of foreign judgments, Restatement, §§ 481-482, FSIA embodies a rule of international law, providing an exclusive list of exceptions to an otherwise comprehensive and unyielding rule of immunity. *Permanent Mission of India v. City of New York*, 551 U.S. 193, 197 (2007), citing *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989); *Verlinden B.V., supra*, 461 U.S. at 488. Moreover, as the legislative history indicates, and as this Court has emphasized, one of the foundational purposes of FSIA was the "codification of international law at the time of FSIA's enactment." *Permanent Mission of India, supra*.

Had the court below considered the state of international law at the time FSIA was enacted, and as it continues to be, it could not have reached the conclusion it did, against, as it acknowledged, the majority view of American courts, *Yousuf v Samantar, supra*, at 378.

Even without this particular history and purpose, the conclusion below was erroneous. It is

long settled law that wherever possible statutes should be interpreted to be consonant with international law, not in breach of it. *Murray v. Schooner Charming Betsey*, 6 U.S. (2 Cranch) 64 (1804); Restatement, § 114. As will be shown, international law requires sovereign immunity in cases such as this. The Fourth Circuit inexplicably failed to account for international law in interpreting the statute's silence.

B. The State of International Sovereign Immunity Law When FSIA Was Enacted Required Immunity As a Matter of Law

International law mandates state immunity, not merely condones it. Ordinarily, a sovereign state may not exercise its sovereign power of adjudication over another equally sovereign state for conduct occurring outside of the adjudicating state's borders, because to do so is to trample on the sovereignty of the adjudged nation.

"*Par in parem no habet imperium*" ("An equal has no dominion over an equal") is a keystone of inter-states relations. This is not a dated maxim, a far-from-realized aspiration. The United Nations' Charter requires the organizations to act "based on the principle of the sovereign equality of all of its Members," Charter of the United Nations, Article II, §1.

Just recently, this Court observed that *par in parem* is, a "venerable principle," *Republic of Iraq v.*

Beatty, 129 S.Ct. 2183, 2186 (2009), rooted, Chief Justice Marshall earlier noted, in "the perfect equality and absolute independence of sovereigns." *Schooner Exchange*, 11 U.S. (7 Cranch) 116, 136 (1812). See G.M. Badr, State Immunity: An Analytical and Prognostic View (1984) at 89 (tracing history of the *par in parem* maxim); L. Caplan, *State Immunity, Human Rights and Jus Cogen: A Critique of the Normative Hierarchy Theory*, 97 AJIL 741, 748-49, nn. 54-61.[4]

Nor is *par in parem* a uniquely American view of international law. See, for examples of foreign formulations of the *par in parem* principle, *Playa Largo v. I Congriso del Parte* (1983), 1 A.C. 244, 262, 2 All E.R. 1064 (Lord Wilberforce); *The Parliament Belge*, 5 P.D. 197, 217 (1974-80), All E.R. Rep. 104 (CA).

Some scholars do offer a less 'legal' view of sovereign immunity, one closer to the "comity"

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[4] This is not to say that sovereign immunity has no policy implications Like its domestic counterpart, foreign sovereign immunity allows foreign public officials to carry out their often difficult and sometimes hazardous duties without fear of being hauled before a distant foreign court (which may be run through with hostile political agendas), to be judged under often amorphous and contested codes of customary international law, and, because of the lower standards of proof applicable in civil cases, the potential for ruinous financial liability for decisions made under immense pressure (or even in the heat of battle).

understanding of the Fourth Circuit. "[T]he doctrine also has important practical necessity, particularly the desire to promote goodwill and reciprocal courtesies among nations." Caplan, *id.*, at n. 64.

Given its limited functional purpose, immunity should not be available, Caplan and others argue, when it does not promote goodwill or desirable reciprocal courtesies, as would be the case where immunity is invoked to shield alleged violations of international human rights law.

Although Caplan, reviewing the scholarly literature, insists that promoting international goodwill, not respect for equal sovereignty, is the true justification for immunity, he concedes (*id.* at 755) that "when one surveys the actual law of sovereign immunity as formulated and as applied, an entirely different picture emerges." That is, the *par in parem* principle is the governing motivation of the legal requirement of immunity.

The United States is obligated by the *par in parem* principle to ensure that its courts do not adjudicate claims against foreign governments.[5] To

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[5] This is not to say that Congress cannot breach its international obligations, if it chooses to do so. It may. Article I, § 8, cl. 10; *Republic of Iraq v. Beatty*, *supra*, 129 S.Ct. 2191; *Hartford Fire Ins. Co. v. California*, 509 U.S. 767 (1993); L. Henkin, Foreign Affairs and the U.S. Constitution (2nd ed.) 232 (1996); Restatement, § 115(1)(a) (1986). Arguably, the Tort Victims Protection Act is an instance of Congress doing so.

do otherwise would be to set the United States above other states. In this sense, limitations on the exercise of raw judicial power inherent in sovereign immunity reflect the limited scope of each nation's sovereignty that is the cornerstone of the system of international relations. These limits are binding on the courts no less than on presidents.

Just as a judge sits above the parties in a courtroom to signify that she stands over and above the parties, a nation judging another in its courts sits over the nation being judged. To the court it may appear that it is deciding only an ordinary tort case, but to the state defendant, the court is engaged in an act of judicial imperialism. The *par in parem* principle bars such an arrogation of authority and the assertion of the power to sit in judgment over those of equal stature.

In this same spirit, this Court has refused to sit in judgment of the actions of foreign governments, even where sovereign immunity is not a formal bar to adjudication. This is the justification for the act of state doctrine under which American courts will not pass on the validity of the actions of foreign governments, even those arguably in violation of international law. Thus, in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), this Court refused to pass on the international legality of the expropriation of property by Cuba's new communist government, citing *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) and its progeny.

The Court summarized its holdings on the act of state doctrine in a way that sounds in the *par in parem* principle, 376 U.S. at 416:

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

Sovereign immunity from suit is not a technical defense only—a disfavored obstacle to the implementation of important provisions of the international legal order. On the contrary, it is a fulfillment of the basic requirements of an international system composed of independent and legally equal sovereigns.

C. Foreign International Law Sets out a Broad Scope of Immunity as of Right

The major debate within the international community on the scope of sovereign immunity when FSIA was enacted was whether to adopt an absolute theory of immunity covering even purely commercial activities of foreign states (for example, communist state trading companies) and ordinary tort cases (of

the kind for which insurance is readily available) or the so-called restrictive theory of immunity adopted earlier by states as diverse as Belgium and Egypt, and embodied in the famous Tate Letter, and, if the latter, in which cases did immunity remain in place. See *Verlinden*, *supra*.

There was, when FSIA was adopted, no debate in international circles over the imperative of sovereign immunity applicable to purely governmental acts as a matter of law. In 1972, just prior to the adoption of FSIA, the Council of Europe (ancestor of today's European Union) adopted a European Convention on State Immunity,[6] a document "generally regarded as reflecting customary international law, *O'Muilleoir v. McDowell*, 2007 NIQB 108 at ¶ 21 (High Court of Justice, Northern Ireland).

After comprehensively listing exceptions tracking the restrictive theory of immunity, the European Convention (§ 15) states its general rule for cases not within any exception: "A Contracting State **shall be entitled** to immunity from the jurisdiction of the courts of another contracting State ...." (Emphasis added.) So basic is immunity that the courts of signatory nations must invoke it on behalf of another contracting state whether or not the defendant state affirmatively asserts its own immunity. (Article 24)

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[6] http://conventions.coe.int/Treaty/en/Treaties/Html/074.htm.

The European Convention provides for certain additional exemptions from immunity for non-signatories to the Convention, but such exemptions do not extend to "acts performed in the exercise of sovereign authority," the core meaning of immunity under the restrictive theory. See Article 27 (2).

Despite the fact that the European Convention was adopted at a time of great ferment over the exact scope of sovereign immunity, there was no suggestion in the Convention that immunity was not a matter of law, or that public officials should not enjoy its protection. Similarly (as discussed in Point II, *infra*) there was no suggestion in the Convention that the rule of immunity adopted would not apply to all, or some, human rights claims.

England,[7] Canada,[8] South Africa,[9], Pakistan[10] and Singapore[11] have likewise codified sovereign immunity as a rule of law, rather than treating it just as a courtesy.

Although the European Convention is, as noted, overtly silent on the question of immunity for

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7 State Immunity Act, 1978 Chapter 33.

8 State Immunity Act, S.C. 1991, c. 41, § 13.

9 Foreign States Immunities Act of 1981 (Act 57).

10 State Immunity Ordinance, 1981, 21 Pakistan Code § 3.

11 State Immunity Act, Statute of the Republic of Singapore, ch. 313, § 3 (1979).

officials (and the statutes cited in notes 7-11 are likewise silent), the Northern Ireland High Court of Justice in *O'Muilleoir*, *supra*, thought it plain that they were immune under the Convention and that in this and other regards the Convention was merely declaratory of existing international law.

D. Sovereign Immunity Extends to Officials Sued for Official Acts

(i) Statutory and Like Materials

The United Nations International Law Commission ("ILC") began work on a draft set of rules, Articles on Jurisdictional Immunities of States and their Property[12] ("Jurisdictional Articles"), after the European Convention was adopted. These Articles are explicit about the availability of sovereign immunity as a matter of law, and that, again as a matter of law, immunity extends to foreign officials for actions undertaken in the course of their duties.

Those rules reflect then current understandings of international law, and while not yet formally binding, see below at p. 25, they reflect an expert and official consensus on the status of international law. The Articles have been cited as authoritative by both the United Kingdom House of

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[12] 1991 Yearbook of the International Law Commission (Vol. II, Part 2).

Lords, *infra* at 26, and the European Court of Human Rights, *infra* at 36.

Work on these Articles began in 1977, shortly after FSIA was enacted, and only a few years after the European Convention was promulgated and completed. "The [Articles] build on experience under the 1972 European Convention ...as well as on state practice under various domestic statutory regimes." D. Stewart, *The U.N. Convention on Jurisdictional Immunities of States and Their Property*, 99 Am. J. Int'l L. 194, 195 and *id.* at n. 2 (2005), including FSIA. The European Convention, FSIA and other analogous immunity statutes and decisions are cited extensively in the ILC's explanatory materials.

The Jurisdictional Articles state that, subject only to listed exceptions immunity is the general rule (Article 5). "A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention."

Unlike FSIA and the European Convention, however, the Jurisdictional Articles are explicit in providing that the immunity of states also protects officers and employees acting in their official capacities.[13] Article 2(b)(iv) defines 'states' to include

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[13] Sovereign immunity is an immunity *ratione materiae*, by virtue of the subject matter of the suit, not the status of the individual, such as head of state or diplomatic immunity (*ratione personae*). Those immunities exist only so long as the

"representatives of the State acting in that capacity." Nothing in the preparatory materials generated by the ILC to explain the inclusion of this definition suggests that the drafters thought they were departing in any way from established principle or state practice in making this explicit.

In the official commentary to the Articles, the International Law Commission explained the inclusion of officials within the scope of state immunity (note 18):[14]

> It is to be observed that, in actual practice, proceedings may be instituted, not only against the government departments or offices concerned, but also against their directors or permanent representatives in their official capacities. Actions against such representatives or agents of a foreign Government in respect of their official acts are essentially proceedings against the State they represent. The foreign State, acting through its representatives is immune *ratione materiae*.

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person holds office. Sovereign immunity relates to the act, and does not evaporate when the actor leaves office.

[14] For ease of reading, we have broken the commentary into smaller paragraphs.

> Such immunities characterized as *ratione materiae* are accorded for the benefit of the State and are not in any way affected by the change or termination of the official functions of the representatives concerned. Thus, no action will be successfully brought against a former representative of a foreign State in respect of an act performed by him in his official capacity.
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> State immunity survives the termination of the mission or the office of the representative concerned. This is so because the immunity in question not only belongs to the State, but is also based on the sovereign nature or official character of the activities, being immunity *ratione materiae*.

(Footnotes omitted).

The Articles as finalized by the International Law Commission in 1991 and reaffirmed in 1999 were approved without relevant changes by the General Assembly (A.Res./59/38 (2004)), and sent for ratification to the UN member states. (They currently await the requisite number of signatures to be fully effective.) The preamble to the Articles recites that the Articles took into account "state practice with regard to the jurisdictional immunities

of States." The Resolution itself notes that the Articles reflect the importance of conventional practice.

The General Assembly Resolution further noted that the Assembly understood the Articles not to apply to criminal prosecutions for violations of international humanitarian law. Having taken note of the problem of enforcement of international law norms, and contemplating that immunity would not shield officials from criminal actions, the General Assembly notably failed to place civil actions against state employees as outside the immunity provided for in Article 2(b)(iv). Neither has any reservations on the inclusion of employees been entered by states ratifying the Articles.[15]

(ii) International Judicial Decisions Affirm That Immunity Extends to Officials

In *Jones v. Saudi Arabia*, [2006] UKHL 26 (2006), the House of Lords affirmed that a sovereign's immunity extends to its officials when acting in their official capacities. Jones, a British citizen, was allegedly tortured by Saudi officials who suspected him of involvement in terrorism. He sued those officials in English courts.

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[15] U.N. Treaty Collection, http://treaties.unorg/Pages/ViewDetails.aspx?stc=TREAT&mtdsg-no=III-138&chapter=3&kabg=en (last visited November 30, 2009).

His suit was met with a defense of sovereign immunity on behalf of both Saudi Arabia and its officials. Overturning a lower court decision that immunity did not extend to officials charged with torture in civil proceedings, the House of Lords upheld the claim of immunity.

The Lords acknowledged that both the European Convention and the implementing 1978 United Kingdom's State Immunity Act of 1978 were silent as to whether officials were protected by immunity. However, Lord Bingham observed in his speech to the House of Lords that the rule of the Judicial Articles adopted by the United Nations that officials enjoyed the state's immunity was supported by long-standing domestic and international authority, and this was not an innovation, but simply captured the existing rule of law. *Id.*, at ¶ 10. Accordingly, the United Kingdom's law ought to be read to reach the same result:

> There is, however, a wealth of authority to show that in such case the foreign state is entitled to claim immunity for its servants as it could if sued itself. The foreign state's right to immunity cannot be circumvented by suing its servants or agents. Domestic authority for this proposition may be found in *Twycross v Dreyfus* [1877] LR 5 Ch D 605, 618-619; *Zoernsch v Waldock*

[1964] 1 WLR 675, 692; *Propend Finance Pty Ltd v Sing* [1997] 111 ILR 611, 669; *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147, 269, 285-286; *Holland v Lampen-Wolfe* [2000] 1 WLR 1573, 1583.

Courts in Germany, the United States, Canada and Ireland have taken the same view: see *Church of Scientology Case* [1978] 65 ILR 193, 198; *Jaffe v Miller* (1993) 13 O. (3d) 745, 758-759; *Schmidt v Home Secretary of the Government of the United Kingdom* [1994] 103 ILR 322, 323-325. The International Criminal Tribunal for the Former Yugoslavia has also taken the same view: *Prosecution v Blaskic* [1997] 110 ILR 607, 707.[16]

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[16] For Canadian holdings to the same effect, under a statute which also does not explicitly extend immunity to state officials, see *Ritler v. Donnell*, (2005) A.J. 598, 2005 ABQB 197, 2005 A.B. C Lexis 1136, ¶ 24 (U.S. officials as defendants); *U.S. v. Friedland*, 46 O.R. (3d) 321, 1999 Ont. Rep. Lexis 129 (1994) (discussing whether immunity of officials is independent or derivative; court finds that U.S. officials are immune either way); *Jaffe v. Miller*, 13 Or. (3d) 745 (1993), 1993 Ont. Rep. Lexis 233 (alleging illegal U.S. arrest), citing S.Sueharitkul, Immunities of Foreign

Id. (Some citations omitted)

In his speech, Lord Hoffman reached the same result, relying primarily on cases from the International Criminal Tribunal for the Former Yugoslavia (*Prosecution v. Blaskic*, 110 ILR 607, 707) (1997)) and Germany (Church of Scientology Case, 65 ILR 193, 198 (1978) ('any attempt to punish state conduct by targeting the foreign agent performing the act would undermine the absolute immunity of sovereign states in respect of sovereign activity.'))

Lord Hoffman joined Lord Bingham in concluding (¶ 68) that "state immunity affords individual employees ... of a foreign state protection under the same cloak as protects the state itself."

Efforts to overturn *Jones* in Parliament have failed.[17]

States Before National Authorities, 149 Recueil (**29). "A State acts through its organs or agencies, which normally include the persons, representatives ... which constitutionally form an organic part of the machinery of the central government of a sovereign State."

[17] Torture (Damages) Bill, HL Bill 30 (54/3), introduced by Lord Archer of Sandwell in February 2008. The text may be viewed at www.publications.parliament.uk/pa/ld200708/idbills/030/20008030.pdf (last visited 11/30/2009).

E. American Law Reflects the Same Understanding of International Law

There is statutory evidence that Congress anticipated the *Jones* result as the general rule. When Congress added 28 U.S.C § 1605(7), allowing actions for damages caused by terrorist acts sponsored by officially certified state sponsors of terrorism, it provided explicitly for actions against state officials—an iteration that would be wholly unnecessary if officials never enjoyed immunity under FSIA in the first place. [18]

Similarly, in *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009), petition for cert. pending, 09-227. plaintiffs formerly incarcerated at Guantanamo Bay sued several government officials for violations of the Geneva Conventions. The court upheld the dismissal of the case under the Westfall Act, which provides that tort actions against federal officials are to be treated as actions against the United States, and that therefore they are barred by sovereign immunity unless claimants came within the waiver provisions of the Federal Torts Claim Act.

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[18] See, generally, C. Bradley & J. Goldsmith, Foreign Sovereign Immunity and Human Rights Litigation, 13 Green Bay 2d 9, 10 (2009): '[T]he FSIA confers presumptive immunity in suits against state officials, and ... this immunity applies even in human rights cases."

The decision has been criticized, but even one critic acknowledges "from the perspective of international law, one cannot find fault with the Westfall Act, substituting the United States as defendant ... if the act of torture "were committed in the course of employment." B. Fassbender, *Can Victims Sue State Officials for Torture*, 6 Journal of International Criminal Justice 347, 362 (2008)

II. HUMAN RIGHTS CLAIMS ARE NO EXCEPTION TO SOVEREIGN IMMUNITY

A. The Normative Hierarchy Theory Excluding Human Rights Claims from Immunity Has No Basis in Law

If an official can ordinarily invoke sovereign immunity, the only remaining way to strip him of his immunity in cases such as this would be to carve out exceptions for human rights violations. No such exception has been recognized in international law. The typical statutes listed at notes 7-11, *supra*, each contain lengthy lists of exemptions from immunity, but not this one. Neither, of course, do the European Convention, the Judicial Articles or FSIA list a human rights exception, other than, perhaps, matters covered by the Torture Victims Protection Act, P.L. 102-256, 106–Stat.73. Hence, no such exemption should be read into FSIA.

Subsequent to the passage of FSIA (and certainly after the adoption of the Jurisdictional Articles), a theory has emerged, advanced almost

exclusively by academics, that civil actions pressing human rights claims, especially those having *jus cogens* status, cannot be defeated by invocation of sovereign immunity. See, *e.g.*, H. Fox, The Law of State Immunity (2d ed. 2008) at 150-41; L. M. Caplan, *State Immunity, Human Rights and Jus Cogens: A Critique of the Normative Hierarchy Theory*, 97 Am.J.Int. Law 741 (2003). The theory envisions a "normative hierarchy" of international law principles, with human rights, and especially *jus cogens*, principles standing at their peak. Immunity is, on this theory, far lower down the values ladder. No lesser principle, and surely not a mere "procedural" rule such as sovereign immunity, can be allowed to stand in the way of vindicating universally accepted human rights rules.

An alternative form of the argument advanced by Caplan, *supra*, is reminiscent of the arguments that unconstitutional acts cannot be under color of law, since no state can authorize constitutional violations. Since immunity is a public policy designed to further good relations between states, and such relations are not furthered by *jus cogens* violations, immunity is unavailable in such cases. This latter argument fails because, as noted in Point I.B., *supra*, immunity is a foundational rule of an international system of states enjoying equal sovereign status, not a courtesy to further good inter-state relations. Lord Bingham rejected this

argument as a matter of international law in *Jones*, *supra*, at ¶¶ 17-28.

Whether advocates truly intend the full scope of the argument is open to question. *Jus cogens* prohibitions, for example, cannot be overridden in substance (*i.e.*, torture is permitted in cases of terrorism) but it hardly follows that there can be no procedural bars to enforcement of human rights norms. As best we know, no advocate of the normative hierarchy theory urges that those accused of human rights violations bear the burden of proving their innocence or that hearsay evidence can be admitted against the defendant, but not on her behalf.

Whatever the logical limits of the normative hierarchy theory, it has not been accepted by nations or their courts. This rejection, rather than abstract intellectual arguments advanced by those free of the responsibility for governance, is what matters.

In *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), a case brought against Saudi Arabia challenging acts of torture allegedly committed by Saudi officials, this Court said that FSIA provided the exclusive basis for jurisdiction over foreign states, and that in that case, alleging a violation of well-settled international human rights law absolutely banning torture, the only arguable basis for jurisdiction was the commercial activity exception, 28 U.S.C. § 1605(a)(2). This Court did not suggest a judicially created human rights exception.

Similarly, in *Argentine Republic v. Amerada Hess Shipping Co.*, 488 U.S. 428 (19889), the Supreme Court rejected the claim that FSIA's sovereign immunity protection did not apply to alien tort claims, *id.* at 435-37. The Court also rejected the claim that a nation's adherence to international treaties governing its challenged conduct constituted an implied waiver of immunity under FSIA, *id.*, 442-43. If this is true of treaty law, resting on state consent, it ought to be true *a fortiori* of claims arising under customary international law.

B. Most Domestic and Foreign Courts Reject the Normative Hierarchy Theory

Unlike the court below[19] several federal courts have held that an allegation of human rights violation does not supersede FSIA conferred sovereign immunity.[20] This American majority rule

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19 See also *Enaharo v. Abubakar*, 408 F.3d 877 (7th Cir. 2007) (Cudahy, J., dissenting in part).

20 *Belhas v. Ya'alan*, 515 F.3d 1279 (D.C. Cir. 2008); *Hwang Geum Joo v. Japan*, 323 F.3d 579 (D.C. Cir. 2003); *Sampson v. Federal Republic of Germany*, 250 F.3d 1145 (7th Cir. 2001); *Cabrini v. Government of Republic of Ghana*, 165 F.3d 193 (2d Cir. 1999); *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C .Cir. 1994); *Smith v. Socialist People's Libyan Arab Jamhiriya*, 101 F.3d 239 (2d Cir. 1996). See, *In Re Estate of Ferdinand Marcos*, 25 F.3d 1467 (9th Cir. 1994); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 694 (9th Cir. 1992). And see *Matar v.*

finds parallels in the rulings of most foreign courts to consider the issue. The normative hierarchy theory was advanced in the House of Lords in *Jones* and squarely rejected. Lord Bingham explained:

> In countering the claimants' argument the Kingdom ... is able to advance ...arguments which in my opinion are cumulatively irresistible. ... [T]he claimants are obliged to accept, in light of the *Arrest Warrant* decision of the International Court of Justice [2002] ICJ Rep. 3 that state immunity *ratione personae* can be claimed for a serving foreign minister accused of crimes against humanity. Thus, even in such a context, the international law prohibition of such crimes, having the same standing as the prohibition of torture, does not prevail. It follows that such a prohibition does not automatically override all other rules of international law. The International Court of Justice has made plain that breach of a *jus cogens* norm or international law does not suffice to

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Dichter, 563 F.3d 9 (2d Cir. 2009) (leaving issue open, noting split of authority and applying common law sovereign immunity).

confer jurisdiction (*Democratic Republic of the Congo v. Rwanda* (unreported) 3 February 2006, ¶ 64). As Hazel Fox QC put it (The Law of State Immunity (2004), p. 525):

> State immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict a prohibition contained in a *jus cogens* norm but merely diverts any breach of it to a different method of settlement. Arguably, then, there is no substantive content in the procedural plea of State immunity upon which a *jus cogens* mandate can bite.

Id. at ¶ 24).

Lord Bingham also dismissed as a legal fiction the argument that since a state was without authority to authorize a violation of international human rights norms, a government official carrying out such a violation could not be said to be an official actor. *Id.* at ¶¶ 17-27.

Lord Hoffman agreed. After surveying international decisions at length (some of which are further discussed below) he observed that there was

no torture exemption from sovereign immunity in international law. (*Id.* at ¶¶ 42-62)

Both Lords cited with approval the decision of the European Court of Human Rights in *Al-Adsani v. United Kingdom* [2001] 34 EHRR 273.[21] Al-Adsani claimed to have been tortured by various Kuwati officials. The English courts had held that sovereign immunity was a bar to suit under the United Kingdom's 1978 State Immunity Act, relying in part on *Argentine Republic v. Amerada Hess Shipping Corp.*, *supra*, and *Siderman*, *supra*.

The European Court held that this judgment did not violate European human rights treaty guarantees of access to courts. The European Court wrote:

> In its Report on Jurisdictional Immunities of States and their Property (1999), the working group of the International Law Commission (ILC) found that over the preceding decade a number of civil claims had been brought in municipal courts, particularly in the United States and United Kingdom,

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[21] Similar results were reached contemporaneously in two other cases before the European Court of Human Rights. *Fogarty v. U.K.* [2002] 34 EHRR 12; *McElhinney v. Ireland* [2002], 12 BHRC 114 (alleging unlawful killing). See, to the same effect, *Holland v. Lampen-Wolf* [2000], 1 WLR 1573 (libel).

against foreign governments, arising out of acts of torture committed not in the territory of the forum State but in the territory of the defendant and other States. The working group of the ILC found that national courts had in some cases shown sympathy for the argument that States are not entitled to plead immunity where there has been a violation of human rights norms with the character of *jus cogens*, although in most cases the plea of sovereign immunity had succeeded. The working group cited the following cases in this connection: (United Kingdom) *Al-Adsani v. State of Kuwait*, 100 International Law Reports 465 at 471; (New Zealand) *Controller and Auditor General v. Sir Ronald Davidson* [1996], 2 New Zealand Law Reports 278, particularly at 290 (per Cooke, P.); Dissenting Opinion of Justice Wald in (United States) *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994) at 1176-1185; *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992); *Argentine Republic v. Amerada Hess Shipping Corporation*, 488 U.S. 428

(1989); *Saudi Arabia v. Nelson*, 100 International Law Reports 544.

Moreover, the European Court drew an important line between criminal prosecution and civil actions. Distinguishing civil actions from the decision that allowed former Chilean dictator Pinochet to be extradited and tried outside of Chile for international crimes, the Court wrote (¶ 34):

> The coming into force of the UN Convention ... had created a universal criminal jurisdiction in all the Contracting States in respect of acts of torture by public officials, and the States Parties could not have intended that an immunity for ex-heads of State for official acts of torture would survive their ratification of the UN Convention. The House of Lords (and, in particular, Lord Millet, at p. 278) made clear that their findings as to immunity *ratione materiae* from criminal jurisdiction did not affect the immunity *ratione personae* of foreign sovereign States from civil jurisdiction in respect of acts of torture.

Al-Adsani was reaffirmed by the European Court in the following year in a preliminary ruling on an appeal of a Greek high court decision finding that Germany enjoyed sovereign immunity for the

1944 Distomo massacre which took place on Greek soil. The claimant unsuccessfully sought relief in the European Court of Human Rights:[22]

> The ... Court does not find it established, however, that there is yet acceptance in international law of the proposition that states are not entitled to immunity in respect of civil claims for damages against them in another state for crimes against humanity. The Greek Government cannot therefore be required to override the rule of complete immunity against their will.

Accord K. Bartsch & B. Elbering, *Jus Cogens v. State Immunity, Round Two: The Decision of the European Court of Human Rights in Kalogreopoulou v. Greece and Germany*, 4 German L.Jnl. 477 (2003).

A similar conclusion was reached by the ICJ in the *Armed Activities In the Congo* case, ICJ Reports [2002], ¶ 64. Rwanda was charged with various *jus cogens* violations under several treaties, including the Genocide Convention. That convention provides for ICJ jurisdiction over disputes arising

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[22] The decision in *Kalogreopoulou v. Greece and Germany*, is apparently not available in English. The translation here is from H. Fox, The Law of State Immunity (2d ed. 2008) at 275. The decision of the Greek court also appears to be unavailable in English.

under the Convention. Rwanda, however, had acceded to the Genocide Convention with a reservation against acceptance of ICJ jurisdiction. The Congo argued that, insofar as the reservation interfered with enforcement of an internationally binding human rights norm, it was invalid. The ICJ rejected the argument:

> "[T]he *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things" (*East Timor (Portugal v. Australia), Judgment*, I.C.J. Reports 1995, p. 102, para. 29), and that the mere fact that rights and obligations *erga omnes* may be at issue in a dispute would not give the Court jurisdiction to entertain that dispute. The same applies to the relationship between peremptory norms of general international law (*jus cogens*) and the establishment of the Court's jurisdiction: the fact that dispute relates to compliance with a norm having such a character, which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute ... Under the Court's Statute that

jurisdiction is always based in consent

....

Indeed, even those who disapprove of the invocation of immunity in some or all human rights claims acknowledge that their view is not now law. See, *e.g.*, S. Humes-Schultz, *Limiting Sovereign Immunity In The Age of Human Rights Litigation*, 25 Hastings Int'l & Comp. L.Rev. 261 (2002).

The sole international exception of which *amicus* is aware is a decision of the Italian Supreme Court in *Ferrini v. Federal Republic of Germany*,[23] a case seeking redress in Italy for a Nazi massacre occurring on Italian soil, but as Professor Fox notes (H. Fox, The Law of State Sovereignty, *supra*, at p. 150), the decision in that case (which does not involve extra-territorial adjudication) must be set against contrary decisions in Canada, England, France and Germany. More to the point, the correctness of *Ferrini* is now pending before the International Court of Justice, Case Concerning Jurisdictional Immunities of the State (Germany v. Italy), with final briefs due in December 2009.[24]

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[23] Cited in H. Fox, *supra*, at p 150 (citations omitted).

[24] In a reservation to the Jurisdictional Articles, *supra*, n. 12, Norway noted that its ratification was without prejudice to future developments in the field of human rights. The clear implication is that at present human rights claims are subject to the Convention's immunities.

As Professor Fox concludes,[25] "To confer on all national courts jurisdiction to entertain proceedings against a foreign State for violation of fundamental human rights affecting the physical integrity of the person would ... 'risk creating total judicial chaos.'" There is no indication that Congress, in passing FSIA, intended such anomalous result so out of step with prevailing international law.

III. IMMUNITY FROM CIVIL ACTIONS DOES NOT AMOUNT TO IMPUNITY

A. There are Ample International Remedies Apart from Civil Suits in Other Countries

Sovereign immunity in the international context, as does its domestic counterparts of sovereign immunity and the Eleventh Amendment, closes off one avenue of relief. That is a reasonable price to pay for the respect for the equality of other nations.

The loss of a civil monetary remedy hardly amounts to a grant of impunity to those who trample settled international human rights norms. First and foremost, as the General Assembly said in approving the Jurisdictional Articles, and as the House of Lords held in the *Pinochet* case, immunity from civil damages suits does not extend to criminal prosecutions either in an international tribunal such

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[25] *Id.* at 158.

as the International Criminal Court, *ad hoc* tribunals (as in the case of Rwanda), or in any court of a state empowered to exercise universal criminal jurisdiction. Surely, the possibility of a lengthy jail sentence will have at least as much deterrent effect as the possibility of a civil suit in a far away state.

Second, a state may waive its own immunity—the immunity from which the official's immunity is derived. This will often happen when a successor government repudiates its predecessor's policies.

Third, excluding judicial actions does not foreclose other effective measures such as diplomatic sanctions, truth commissions, restraints on the right to travel and the denial of sanctuary or asylum to those accused of gross violations of human rights.

Fourth, private actors assisting or participating in human rights violations may, perhaps, be available as defendants, and they will have no claim to immunity. See, J. Davis, Justice Across Borders: The Struggle for Human Rights in U.S. Courts, 204-38 (2008) (describing many such lawsuits).

B. There Are Salient Reasons to Permit Criminal Actions But Bar Civil Ones

The difference between criminal actions and civil actions is not one of form only. Criminal actions are initiated by either a state or an international body, subject to political and prudential constraints

that are absent in the case of private plaintiffs. Surely, in the case of states (but in the case of international bodies, as well), a prosecution must stand the test of universality. Would the prosecutor act against all similarly situated violators from other states, or, more precisely, would the state support a similar prosecution brought against its own officials?

If, for example, the United States were to prosecute Israeli officials for the "targeted killing" of a Hamas bomber in Gaza as an extra-judicial killing, see *Matar*, *supra*, n. 20, it must take into account that others will use that precedent to prosecute the Americans responsible for the killing of al Qaeda members and civilian bystanders in Yemen, or the routine use of drone-launched missiles in Afghanistan and Pakistan.

Governments are likely to prosecute only the clearest violations, cases in which the law is clear and any countervailing national interests are weak. Prosecutorial discretion can be relied on to avoid marginal cases, or cases with great adverse impact on state interests of many countries.

None of this is true of private civil actions. Such suits can be brought on a non-reciprocal basis; they can be brought not to enforce clearly established law, but to make new law. They can be brought even where the law is unclear. Private suits can and will be brought without regard to countervailing state interests, indeed, often with the purpose of denigrating state interests. They can be

brought by those implacably hostile to a particular state, with no thought of even-handed application.

And, contrary to one of the purposes of FSIA, the resulting wave of cases will embroil the Executive Branch in deciding whether adjudication would adversely implicate the foreign policies of the United States.

Consider, for example, what would happen if Gazans were to file suit in a U.S. District Court, seeking damages for alleged Israeli violations of the law of war 'documented' in the Goldstone Report. Israel would tell the State Department that there could be no peace process if the Palestinian suit were to proceed. Palestinians would say to the State Department that there could be no peace if the impunity of Israel did not end. See *Palestinians, In Reversal, Press U.N. Gaza Report*, NY Times, October 14, 2009, www.nytimes.com /2009/10/15/ world/mideast/15nations.html?Sep=2859=Goldstone-report%26+peace. See also U.N. Press Release, *Leave All Politics and Selectivity At the Door and Take Up Cause of Justice*, GA/10882 (2009). The sub-caption is telling: "*Palestinian Observer Says Israel Must Be Held Accountable for Crimes In Gaza, Israeli Delegate says Politicized Report Damages Effort to Revitalize Peace Talks.*" The State Department would have to find a way through that thicket as it sought to advance the peace process.

Criminal proceedings are brought to enforce the law; civil complaints can and often will be

brought to challenge or expand the law globally. Federal courts will become legislators of international law without the legitimacy that comes through the treaty-making and other consensus building mechanisms by which international law is usually adapted to new circumstances.

CONCLUSION

For the reasons stated, the judgment should be reversed as to any claim not arising under TVPA.

Respectfully submitted.

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Dated: December 4, 2009

AMICUS CURIAE BRIEF

(10)

No. 08-1555

Supreme Court, U.S.
DEC 7 - 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MOHAMED ALI SAMANTAR,

Petitioner,

—v.—

BASHE ABDI YOUSUF ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* THE ANTI-DEFAMATION LEAGUE, SUPPORTING NEITHER SIDE

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INTEREST OF THE *AMICUS CURIAE*

The Anti-Defamation League ("ADL"), as *amicus curiae*, submits this brief in support of neither party.[1]

ADL was organized in 1913 to combat racial, ethnic, and religious discrimination, and to fight hate, bigotry, and anti-Semitism. It is today one of the world's leading civil and human rights organizations. ADL's nearly 100-year history is marked by a commitment to protecting civil and human rights, both in the United States and abroad. In this connection, ADL has often filed briefs *amicus curiae* in cases arising under the Alien Tort Statute ("ATS") and the Torture Victims Protection Act of 1991 ("TVPA"), including in *Princz v. Fed. Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992); and *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44 (2d Cir. 1991).

INTRODUCTION AND SUMMARY OF ARGUMENT

As we are reminded by the mere mention of the Holocaust or such places as Serbia, Rwanda, Sudan, Argentina, Haiti, and the Congo—and, of course, by earlier tragedies and crimes as well—people, acting through governments or political movements, can

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents have been lodged with the Court.

wreak terrible evil on their neighbors, in ways that all modern nations condemn as illegal and wholly unjustifiable. It is hardly surprising, therefore—indeed it is essential—that the United States, and other civilized nations as well, have afforded legal claims to obtain such justice as may be possible in such circumstances. Equally important, however, is that such process not be abused for political purposes.

Any decision in this case may have an impact on how the ATS and TVPA operate. On the one hand, in adjudicating the application of immunity under the Foreign Sovereign Immunities Act ("FSIA"), the Court should protect the integrity of the ATS and TVPA by ensuring that, at least, there is the possibility that the worst offenders—the perpetrators of genocide—are held to account for their violations of *jus cogens* norms. On the other hand, the Court should take care not to extend an open invitation to sue foreign officers past or present, making the courts a vehicle for political but meritless lawsuits.

While this brief suggests no specific answer to this dilemma, it does explicate several key landmarks for use in avoiding this Scylla and Charybdis. *Amicus* believes that it can best assist the Court by outlining boundary issues that will help keep the ATS and TVPA vital but cabined within appropriate limits.

There is no question that the TVPA and the ATS are important: an examination of the cases silences any doubt about the essential justice of many such claims.[2]

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[2] *See, e.g., Chavez v. Carranza*, 559 F.3d 486 (6th Cir. 2009) (jury award of $1.5 million in compensatory and punitive damages to victims of torture, extrajudicial killing, and crimes

Where they properly apply, such suits provide vital deterrence and needed economic remedies. They also vindicate the most elementary claims of justice: it would be unjust, indeed monstrous, if those who profited from crimes against human rights could with impunity live the good life in America's comfortable suburbs and gated communities, often on stolen assets, while their victims may be living just miles away with maimed bodies and haunted memories.[3]

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against humanity, including acts of torture by electrocution and with acid), *cert. denied*, 130 S.Ct. 110 (2009); *Arce v. Garcia*, 434 F.3d 1254 (11th Cir. 2006) (jury award of $54.6 million in compensatory and punitive damages where plaintiffs had been tortured from ten to twenty-two days); *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005) (jury award of $4 million in compensatory and punitive damages where defendant had participated in the torture and execution of plaintiffs' son and brother); *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1118 (E.D. Cal. 2004) (jury awarded $5 million in compensatory and $5 million in punitive damages for assassination of Archbishop Romero). *See also* Brief of the Center for Justice and Accountability at 6-13, filed in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (discussing the facts in ATS cases in which plaintiffs prevailed arising from torture, extrajudicial murder, and genocide).

[3] *See, e.g., Chavez*, 559 F.3d at 491 (defendant had become a naturalized citizen of the United States and lived in Memphis, Tennessee when plaintiffs commenced their action); *Cabello*, 402 F.3d at 1153 (defendant lived in Miami, Florida when plaintiffs commenced the lawsuit); *Jean v. Dorelien*, 431 F.3d 776, 778 (11th Cir. 2005) (noting that defendant had won $3.2 million in the Florida State Lottery subsequent to the events in suit); *In re Estate of Ferdinand Marcos*, 25 F.3d 1467, 1469 (9th Cir. 1994) (former Philippine president accused of unlawful torture and execution fled to and remained in Hawaii); *Doe*, 348 F. Supp. 2d at 1118 (defendant resided in Modesto, California when lawsuit was commenced).

That the ATS and TVPA afford essential claims, however, does not mean that every claim asserted under these laws is properly brought or meritorious, even where plaintiffs have plainly suffered. *See, e.g.*, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009) (affirming dismissal of claim against oil company for providing substantial assistance to the Republic with the purpose of facilitating the human rights abuses, where plaintiffs submitted insufficient evidence to permit a finding that the company acted with the purpose of harming civilians in southern Sudan). Claims can be (and have been) brought beyond the parameters intended or permitted by Congress, and asserted for impermissible reasons, for example, as political weapons designed to harass leaders and officers of disliked governments, even where evident defenses doom the claims asserted.

As this Court held in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), after hearing from a wide range of *amici* who presented contrary views on a range of important issues related to the ATS and TVPA, preserving the right to assert such claims within the scope in which Congress has invited them is important—as is respecting the various limits Congress has imposed.

In recent years, US courts have sought to strike a balance, protecting the ATA, TVPA and FSIA. Indeed, as the United States has noted, in many circumstances the same result would be reached *regardless* of how the Court decides the FSIA questions presented. *See generally* Brief for the United States as *Amicus Curiae*, filed in *Fed. Ins. Co. v. Kingdom of Saudi Arabia*, 129 S. Ct. 2859 (2009). Thus, even if the FSIA does not afford immunity to individuals

who hold or have held high governmental positions in foreign states, federal common law generally affords the very same result if the executive branch advises the trial court that immunity should attach.

Notably, ADL has previously taken the position that there is a strong argument against former official immunity where the United States executive branch has advised the court that diplomatic relationships would not be harmed by the assertion of jurisdiction.[4] ADL notes here that reading the FSIA according to its plain language—which does not eliminate common law immunity for present or former officials, but leaves it largely subject to the State Department's position, should it choose to assert one—does offer significant flexibility and case-specific determination that would seem highly useful to the executive branch—and an important protection against the use of the ATS and TVPA as a political cudgel rather than for the remedial purposes Congress intended.

ARGUMENT

I. REGARDLESS OF HOW THE COURT DECIDES THE QUESTIONS PRESENTED, THE FSIA CAN NEVER PROVIDE IMMUNITY FOR VIOLATIONS OF PEREMPTORY NORMS OF INTERNATIONAL LAW

Since the Nuremberg Charter was drafted at the end of World War II under the leadership of the

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[4] Brief of *Amicus Curiae* the Anti-Defamation League at 7-11, filed in *Siderman*, 965 F.2d 699 (focusing on the fact that the regime whose conduct was complained of was "no longer in power").

United States, heads of state, ministers, and other government officials have, in appropriate circumstances, been stripped of their right to rely upon sovereign immunity to avoid prosecution for acts that violate peremptory norms of international law. *See, e.g.*, Charter of the Int'l Military Tribunal, 82 U.N.T.S. 280, art. 7 (1945) (stating that "the official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment"); *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others*, Ex Parte Pinochet Ugarte (No. 3) [2000] 1 A.C. 147 (1999). Such acts generally involve the most heinous crimes, carrying various labels including but not limited to genocide, crimes against humanity, and related acts such as torture. When individuals acting under color of law perpetrate such atrocities, they can and should be held criminally responsible regardless of rank or title. The violations giving rise to individual liability contravene *jus cogens* norms—peremptory norms of "general international law . . . accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted." Vienna Convention on the Law Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 332, 8 I.L.M. 679.

It is self-evident that, because no state can ever derogate from such a peremptory norm of international law, officials who violate such norms are acting outside their lawful capacity and cannot be said to be acting on behalf of a state. At least one court of appeals has accepted this principle and held that no head of state, sued in his individual capacity like petitioner here, can claim immunity for acts that violate *jus cogens* norms. *See Chuidian v. Philippine*

Nat'l Bank, 912 F.2d 1095, 1106 (9th Cir. 1990); *In re Estate of Ferdinand Marcos*, 25 F.3d at 1472; *Trajano v. Marcos*, 978 F.2d 493 (9th Cir. 1992). In so holding, the Ninth Circuit correctly observed that FSIA only provides immunity for government officials who act in their official capacities, but "will not shield an official who acts beyond the scope of his authority." *Chuidian*, 912 F.2d at 1106. *See also Enahoro v. Abubakar*, 408 F.3d 877, 893 (7th Cir. 2005) (Cudahy, J. dissenting); *Princz*, 26 F.3d at 1179 (Wald, J. dissenting). When a present or former head of state violates a peremptory norm by, for example, engaging in "acts of torture, execution, and disappearance," his or her actions violate *jus cogens* norms and fall outside the scope of the individual's authority. *In re Estate of Ferdinand Marcos*, 25 F.3d at 1472. Therefore, by definition they cannot be "the acts of an agency or instrumentality of a foreign state within the meaning of FSIA." *Id.*

Although the Second, Seventh, and D.C. Circuits have rejected this line of reasoning, they have done so largely on the ground that "FSIA contains no unenumerated exception for violations of *jus cogens* norms." *See Belhas v. Ya'alon*, 515 F.3d 1279, 1287 (D.C. Cir. 2008); *Matar v. Dichter*, 563 F.3d 9, 14 (2d Cir. 2009) ("there is no general *jus cogens* exception to FSIA immunity"); *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 241 (2d Cir. 1996); *Ye v. Zemin*, 383 F.3d 620, 627 (7th Cir. 2004) ("FSIA did not include an implied exception to its general grant of sovereign immunity to foreign states where a foreign state was accused of violating *jus cogens* norms"). Although a superficial read of FSIA may provide a modicum of support for these decisions, both the argument above and a close tex-

tual analysis indicate that these holdings are incorrect. In particular, 28 U.S.C. § 1605(a)(1) removes immunity of a foreign state in any case "in which the foreign state has waived its immunity either explicitly or by implication."

Notwithstanding FSIA's silence on what might constitute such an implicit waiver of immunity, the legislative history of FSIA makes clear that determinations of "claims by foreign states to sovereign immunity are *best made by the judiciary on the basis of a statutory regime which incorporates standards recognized under international law.*" H.R. Rep. No. 1487, 94th Cong., 2d Sess. 12, 14, *reprinted* in 1976 U.S.C.C.A.N. (90 Stat. 2891) 6604, 6613 (emphasis added). As the observance of *jus cogens* is the highest recognized standard of international law, it follows that Congress likely intended to incorporate a *jus cogens* exception into 28 U.S.C. § 1605(a)(1). Stated differently, because the observance of *jus cogens* is so universally recognized as vital to the functioning of a community of nations, every nation must (by definition) waive its traditional sovereign immunity for violating such fundamental standards "[by] the very fact that it is a state." *Smith*, 101 F.3d at 242 (quoting Adam C. Belsky *et al.*, *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 Cal. L. Rev. 365, 399 (1989)). At a minimum, if the FSIA applies to individuals at all, this exception should apply to individuals, including former officials, who are sued in the United States for violating *jus cogens* norms. *Cf. In re Estate of Ferdinand Marcos*, 25 F.3d at 1471-71 (concluding that FSIA immunity does not apply when individual officials are sued for violating *jus cogens* norms whereas FSIA immunity does apply

when the state itself is sued for violating *jus cogens* norms). Such an exception, whether defined broadly or narrowly, would give effect to fundamental principles of international law and recognize equally that a "state that violates these fundamental requirements of a civilized world thereby waives its right to be treated as a sovereign." Brief of *Amici Curiae* The Anti-Defamation League *et al.*, *quoted in Princz*, 26 F.3d at 1173.

Of course, recognizing that such an exception exists does not address how broadly it reaches, and leaves open the question of whether it applies in this case. Those issues are beyond the scope of this brief. *Amicus* urges that no matter how this case is decided, the Court should not issue a ruling that undermines the possibility of a *jus cogens* exception to the FSIA.

II. AT LEAST ELEVEN DIFFERENT DOCTRINES OR PRINCIPLES KEEP ATS AND TVPA CLAIMS WITHIN APPROPRIATE BOUNDS, REGARDLESS OF THE APPLICATION OF THE FSIA TO PRESENT OR FORMER OFFICIALS

Amicus is aware of efforts by some to draw legitimate governments and their officials into U.S. courts for political purposes. However, developments in ATS and TVPA jurisprudence over recent years appear to ensure that there is no need to summon the FSIA to constrain an otherwise ungovernable ATS and TVPA. Existing doctrine already ensures that ATS and TVPA claims beyond the narrow categories Congress has allowed will be dismissed.

Amicus urges the Court, in its ruling, to take care to ensure that the doctrines and principles summarized below continue to protect defendants from politically-motivated ATS and TVPA claims. The relevant doctrines and principles are:

1. Political Questions;
2. Common Law Immunities;
3. The Law of Nations;
4. The Element of Intent;
5. Foreign State Action;
6. Failure to Establish a Recognized Basis for Liability;
7. Standing;
8. Appropriate Defendants;
9. Exhaustion of Remedies;
10. Forum Non Conveniens; and
11. Statutes of Limitations.

We address each of these doctrines or principles succinctly in the sections that follow.

1. Political Questions

A key threshold issue is whether ATS and TVPA claims present an unjusticiable political question. Courts have dismissed claims brought under both statutes as barred by the political question doctrine, which " 'excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution" to Congress or the Executive Branch. *Bancoult v. McNamara*, 445 F.3d 427, 432 (D.C. Cir. 2006) (quoting *Japan Whaling Ass'n v. Am.*

Cetacean Soc'y, 478 U.S. 221, 230 (1986)). This Court indicated in *Sosa* that the doctrine may apply, on a case-by-case basis, to claims arising under the ATS and TVPA. *Sosa*, 542 U.S. at 732, 733 n.21.

Where a case presents a nonjusticiable political question, courts are without the subject matter to decide it, and the doctrine has been regularly applied to ATS claims that implicate its core concerns. *See, e.g., Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 982 (9th Cir. 2007) (dismissing, on political question grounds, ATS claim brought by family members whose relatives were killed or injured when Israeli Defense Forces demolished homes in the Palestinian Territories using bulldozers manufactured by and ordered directly from defendant, but paid for by the United States government).[5]

2. Common Law Immunities

As the United States urged this Court earlier this year in its *amicus* brief in *Fed. Ins. Co. v. Kingdom of Saudi Arabia*, 129 S. Ct. 2859, common law immunities, quite apart from those provided by the FSIA, may provide a basis for a court to dismiss a

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[5] *See also Joo v. Japan*, 413 F.3d 45, 46, 49 (D.C. Cir. 2005) (dismissing on political question grounds claims by Chinese and other women "seeking money damages for [allegedly] having been subjected to sexual slavery and torture before and during World War II") (citing *Sosa*); *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260, 1261 (D.C. Cir. 2006) (dismissing ATS and TVPA claims against the United States and former National Security Advisor for alleged human rights violations that occurred in Chile as a result of U.S. foreign policy because of the political question doctrine); *Bancoult*, 445 F.3d at 436-37 (dismissing ATS claims against the United States and individual members of the Departments of State and Defense for injuries sustained as a result of plaintiffs' forced relocation to make way for a military base).

claim brought pursuant to the ATS or TVPA. For instance, under the common law, an individual official is entitled to immunity for acts performed in his official capacity. *Matar*, 563 F.3d at 14 (citations omitted) (not deciding whether the FSIA supplies immunity to individuals, but holding that in any event it did not abrogate preexisting common law immunities for former officials, which are recognized with executive branch approval). Courts defer to the other branches of government, primarily the executive branch, for a determination as to whether a particular individual should be afforded immunity. *See id.*[6]

Similarly, "[a] head-of-state recognized by the United States government is absolutely immune from personal jurisdiction in United States courts unless that immunity has been waived by statute or by the foreign government recognized by the United States." *Lafontant v. Aristide*, 844 F. Supp. 128, 131-32 (E.D.N.Y. 1994). This immunity is premised on the precept that a head of state and his country are the

[6] Although the Court has held that "the [FSIA was designed] to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to 'assur[e] litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process,'" *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983) (citations omitted), that is the case only for foreign states, agencies, and instrumentalities within the FSIA's reach, and says nothing about whether that reach extends to individuals. The recognition by most of the circuit courts of appeal that common law immunities remain effective, and that they are subject to the determinations of the executive (*i.e.*, the State Department), reflects the understanding that the FSIA *reduced*, but could not and should not eliminate, the State Department's role with regard to civil suits against foreign officials which may, or may not, adversely affect our nation's international relations.

same for purposes of immunity, and similarly, that states may not exercise authority over one another. *See id.* at 132. The immunity recognizes that "[h]eads of state must be able to freely perform their duties at home and abroad without the threat of civil and criminal liability in a foreign legal system." *Id.*

In *Matar*, plaintiffs had been injured or represented those who had been injured or died after an Israeli aircraft bombed an apartment building in the Gaza Strip. *See* 563 F.3d at 11. The plaintiffs brought claims under the ATS and TVPA against Avraham Dichter, who, at the time of the attack, was the director of the Israeli Security Agency, one of Israel's primary intelligence organizations, and allegedly responsible for the attack on the apartment building. *See id.* The United States, through the State Department, submitted a statement of interest, urging the court to dismiss the action based upon the common law immunity of an official of a foreign state. *See id.* In affirming the dismissal, the Second Circuit focused on this statement of interest —recognizing the executive branch's prerogative to grant immunity to foreign officials. *See id.* at 14.

In *Lafontant*, a widow had commenced an action against the president of the Republic of Haiti, Jean-Bertrand Aristide, whom she alleged was responsible for the execution of her husband in Haiti. *See* 844 F. Supp. at 130. At the time the widow commenced her lawsuit (under both the ATS and TVPA), Aristide was living in the United States, having been exiled after a military coup. *See id.* Despite his exiled status, the United States continued to recognize Aristide as Haiti's lawful head-of-state. *See id.* Indeed, the Justice Department submitted a

statement of interest effectively urging the court to dismiss the case against Aristide on the basis of head-of-state immunity. *See id.* In dismissing the case, it was irrelevant to the court's decision that Aristide did not have *de facto* control over the government (as he had been ousted). *See id.* at 131. The key, for purposes of immunity, was that the United States recognized him as the lawful head-of-state. *See id.* at 132.

In holding that the FSIA did not abrogate the common law immunities, the court stated:

> The FSIA was not designed to apply to diplomatic or other consular officials. Instead, it was crafted primarily to allow state-owned companies, which had proliferated in the communist world and in the developing countries, to be sued in United States courts in connection with their commercial activities. The FSIA took these cases out of the political arena of the State Department, while leaving traditional head-of-state and diplomatic immunities untouched.

Id. at 137; *see also Ye*, 383 F.3d at 625 (FSIA does not alter common law head-of-state immunity).

3. Scope of ATS Claims: The Law of Nations

In *Sosa*, this Court held that the ATS is a jurisdictional grant of power enacted with the understanding that "the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time." 542 U.S. at 724. But the scope

within which the "law of nations" affords ATS claims is tightly bounded:

> [F]ederal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted . . . And the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts.[7]

Id. at 732-33 (internal citations and quotations omitted). Although *Sosa* cautioned against creating private causes under the ATS, it left the door open—"ajar"—for such claims that have the kind of "definite content and acceptance among civilized nations [as did] the historical paradigms familiar when § 1350 was enacted." *Id.*

Courts since *Sosa* have identified various inquiries that guide decision as to whether a proffered international law norm provides a cause of action under the ATS: a proffered norm must be:

> (1) [ ] a norm of international character that States universally abide by, or accede to, out of a sense of legal obligation; (2) [ ] defined with a specificity comparable to the

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[7] The *Sosa* court reasoned that piracy, violation of safe conducts, and infringement of rights of ambassadors all violated the law of nations at the time the ATS was enacted in 1789. *See id.* at 724.

> 18th-century paradigms discussed in *Sosa*; and (3) [ ] of mutual concern to States.

Abdullahi v. Pfizer, Inc., 562 F.3d 163, 174 (2d Cir. 2009).[8]

Based on those criteria, drawn from this Court's admonition against the judicial expansion of causes of action available under the ATS, many cases brought pursuant to the ATS have been dismissed for failure adequately to state a violation of the law of nations.[9]

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[8] Sources of international law include:

> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.

Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104, 116 (2d. Cir. 2008) (citations omitted), *cert. denied*, 129 S. Ct. 1524 (2009).

[9] *See, e.g., Vietnam Ass'n for Victims of Agent Orange*, 517 F.3d at 115 (use of Agent Orange for defoliation purposes during Vietnam War did not violate law of nations); *Mora v. New York*, 524 F.3d 183, 208 (2d Cir. 2008) (failure of police to inform foreign national that he could contact his consulate after his arrest did not violate law of nations), *cert. denied*, 129 S. Ct. 397 (2008); *Taveras v. Taveraz*, 477 F.3d 767, 782 (6th Cir. 2007) (cross-border parental child abduction by custodial parent did not violate the law of nations); *Cisneros v. Aragon*, 485 F.3d 1226, 1230 (10th Cir. 2007) (violations of 18 U.S.C. §§ 2243(a) (statutory-rape) and § 2242(2) (having sexual relations with someone incapable of appraising the nature of the conduct or physically incapable of refusing to participate in the conduct did not violate the law of nations); *cf. Abdullahi*, 562 F.3d at 187 (medical testing on human subjects without their knowledge or

4. Scope of ATS Claims: Intent

Several ATS cases have been dismissed for plaintiffs' failure to adequately allege intent of the defendants, because certain kinds of conduct are simply not actionable under the ATS absent specific intent.

For instance, the Ninth Circuit affirmed the dismissal of a complaint brought under the ATS, in part, because the plaintiffs had failed to adequately allege intent. *See Abagninin v. AMVAC Chem. Corp.*, 545 F.3d 733, 736 (9th Cir. 2008). Specifically, plaintiffs alleged that corporate manufacturers, distributors and users of a pesticide used along Africa's Ivory Coast were liable for genocide and crimes against humanity under the ATS. *See id.* at 731. The pesticide in question had been linked to male sterility and low sperm counts of local residents. *See id.* The Ninth Circuit reasoned that, because customary international law defines genocide as a "specific intent" crime, the plaintiffs needed to allege that intent (*i.e.*, that the defendants intended to destroy a particular population by their acts), but because plaintiffs failed to do so, the court affirmed the dismissal. *Id.* at 739.

The Second Circuit recently affirmed a dismissal of ATS claims brought by Sudanese citizens who alleged that a Canadian corporation had aided and abetted or conspired with the Sudanese government in violation of international law by committing acts of genocide, war crimes and crimes against humanity. *See Presbyterian Church of Sudan*, 582 F.3d at 256. Specifically at issue in the appeal was whether a claim for aiding and abetting (and conspiracy)

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consent violates the law of nations); *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980) ("deliberate torture perpetrated under color of official authority" violates the law of nations).

under the ATS must allege that the defendant acted with the intent to advance the abuses alleged. *See id.* at 257. The court first reasoned that in order to answer that question, it had to look at international law rather than U.S. law for the answer, because, under *Sosa*, that is how the ATS should be interpreted. *See id.* at 259 (stating that "[w]e agree that *Sosa* and our precedents send us to international law to find the standard for accessorial liability . . . Recognition of secondary liability is no less significant a decision than whether to recognize a whole new tort in the first place."). After examining international law, the court held that an ATS claimant seeking to impose accessorial liability "must show that the defendant provided substantial assistance with the *purpose* of facilitating the alleged offenses." *Id.* at 247 (emphasis added); *see also id.* at 259. Utilizing that standard, the court further held that the plaintiffs had failed to allege that the defendant Canadian corporation had acted with the purpose of harming the citizens of Sudan in any way.

5. "Foreign State Action"

Action under color of the law of a foreign state is required for claims under the TVPA, and claims failing to plead it are subject to dismissal. A cause of action under the TVPA may be brought against "an[y] individual who, under actual or apparent authority, or color of law . . . , of any foreign nation . . . subjects an individual to torture." 28 U.S.C. § 1350(a)(1).

When a private individual is named as a defendant in a TVPA case, in order to satisfy the "foreign state action" requirement, the complaint must allege "a

symbiotic relationship" between the defendant and the government that involves the alleged torture or killing. *See Romero v. Drummond Co.*, 552 F.3d 1303, 1317-18 (11th Cir. 2008) (affirming dismissal of TVPA claim where "plaintiffs failed to offer evidence either that state actors were actively involved in the assassination of the union leaders or that the paramilitary assassins enjoyed a symbiotic relationship with the military for the purpose of those assassinations"). "The determination as to whether a non-state party acts under color of state law requires an intensely fact-specific judgment unaided by rigid criteria as to whether particular conduct may be attributable to the state." *Arar v. Ashcroft*, 585 F.3d 559, 564 (2d Cir. 2009) (dismissing claim where allegation was that defendants acted under color of United States law, not foreign law).

While the ATS contains no such statutory requirement, state actors are the main targets of ATS claims, and state action is required to establish some—although not all, *e.g.*, piracy—causes of action under the ATS. *Compare, Saleh v. Titan Corp.*, 580 F.3d 1, 14-15 (D.C. Cir. 2009) (rejecting idea that ATS claims may be brought against private entities), *Abagninin*, 545 F.3d at 736 (affirming dismissal of ATS claim for "crimes against humanity" where corporate defendants were neither state nor state-like organizations for purposes of international law), *with Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1267 (11th Cir. 2009) ("Some acts, such as torture and murder committed in the course of war crimes, violate the law of nations regardless of whether the perpetrator acted under color of law of a foreign nation or only as a private individual"), *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995)

("certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals").

6. Failure to Establish a Recognized Basis for Liability

ATS and TVPA claims may be brought so long as a claimant is able to demonstrate that an individual accused of torture or other acts otherwise subject to actionable claims is either the direct perpetrator or otherwise liable as a principal under a recognized basis, including (but not limited to) "command responsibility." The litigant bears the burden of pleading and proving the necessary basis. *See, e.g., Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1286 (11th Cir. 2002)" (suggesting, although finding it unnecessary to decide, that plaintiffs in civil suits bear burden of establishing commander's "effective control" over troops who engaged in war crimes).

7. Standing

Under the TVPA, claims may be brought only by the victim or by the victim's representative. *See Fisher v. Great Socialist People's Libyan Arab Jamahiriya*, 541 F. Supp. 2d 46, 55 (D.D.C. 2008). At least one court has held that a plaintiff who brings a claim on behalf of another does not have standing under the TVPA if the victim was not subjected to an extrajudicial killing, *i.e.*, is still alive. *See Doe v. Qi*, 349 F. Supp. 2d 1258, 1313 (N.D. Cal. 2004). In order for a claimant to have standing to assert a TVPA claim on behalf of another, the claimant must have standing to assert a wrongful death action, which is based upon the claimant's state of domicile. *See id.*

In *Fisher*, numerous plaintiffs brought claims under the TVPA based upon a terrorist airplane bombing. *See* 541 F. Supp. 2d at 49. Some plaintiffs brought claims on behalf of themselves, *i.e.*, injuries they suffered as a result of the loss of their loved ones. *See id.* at 55. The court held these plaintiffs did not have standing under the TVPA for these types of claims. *See id.* The court further dismissed the claims brought by individuals who did not have standing to bring wrongful death actions in their state of domicile. *See id.*

The ATS does not address standing, but courts have turned to the TVPA to address standing for these claims. *See Bowoto v. Chevron Corp.*, No. C 99-02506 SI, 2006 WL 2455761, at *11 (N.D. Cal. Aug. 22, 2006) (holding that sibling plaintiffs did not have standing under the ATS because decedents had surviving parents and children).

8. Proper Defendants

In *Mohamad v. Rajoub*, the district court dismissed a TVPA claim brought against, *inter alia*, the Palestinian Authority (the "PA") and the Palestine Liberation Organization (the "PLO") on the basis that neither the PA nor the PLO are "individuals" as contemplated by the TVPA. *See* No. 08-1800 (RJL), ___ F. Supp. 2d ___, 2009 WL 3127206, at *1 (D.D.C. Sept. 30, 2009).

9. Exhaustion of Remedies

The TVPA includes a statutory exhaustion requirement, which provides that the court "shall decline to hear a claim under [the TVPA] if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the

claim occurred." 28 U.S.C. § 1350(2)(b). Exhaustion is not a jurisdictional prerequisite, but is rather an affirmative defense for which a responding party has the burden of proof. *See Jean*, 431 F.3d at 782. Once the responding party establishes that remedies have not been exhausted, then the " 'burden shifts to the plaintiff to rebut by showing that the local remedies were ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile.' " *Mamani v. Berzain*, 636 F. Supp. 2d 1326, 1328 (S.D. Fla. 2009) (dismissing TVPA claim because plaintiff failed to rebut evidence of available remedy in Bolivia) (quoting S. Rep. No. 102-249, at 10 (1991)).

Although the ATS does not contain an explicit exhaustion requirement, *see Lizarbe v. Rondon*, 642 F. Supp. 2d 473, 484 (D. Md. 2009), after *Sosa*, courts have understood one of *Sosa*'s footnotes to suggest that a judicial examination of exhaustion may be warranted in certain ATS cases. *See, e.g., Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 824 (9th Cir. 2008) ("[A] prudential or judicially-imposed exhaustion requirement for ATS claims 'would certainly [be considered] in an appropriate case.' ") (quoting *Sosa*, 542 U.S. at 733, n.21) (alteration in original). The Ninth Circuit further held that "in ATS cases where the United States 'nexus' is weak, courts should carefully consider the question of exhaustion, particularly—but not exclusively—with respect to claims that do not involve matters of 'universal concern.' " *Id.* at 831. For purposes of the ATS, matters of "universal concern" include those such as torture, crimes against humanity and war crimes. *Id.* at 831.

10. Forum Non Conveniens

At least two recent ATS/TVPA cases have been dismissed on the common law doctrine of *forum non conveniens*. When a court determines that a matter would properly be adjudicated in a foreign court, it may dismiss on the basis of *forum non conveniens*. The test for whether to invoke the doctrine is:

> (1) the degree of deference afforded to the plaintiff's choice of forum; (2) whether the alternative forum is adequate; and (3) the balance of the public and private interests implicated in the choice of forum.

Turedi v. Coca-Cola Co., No. 06-5464-cv, 2009 WL 1956206, at *1 (2d Cir. July 7, 2009) (dismissing a complaint alleging, *inter alia*, ATS and TVPA claims, based upon *forum non conveniens* where neither the defendants nor the plaintiffs were U.S. citizens and the alleged injuries stemmed from conduct occurring outside of the United States); *see also Aldana v. Del Monte Fresh Produce N.A., Inc.*, 578 F.3d 1283, 1300 (11th Cir. 2009) (affirming dismissal of ATS and TVPA claims based upon *forum non conveniens*).

11. Statute of Limitations

There is a ten year statute of limitation under both the ATS and TVPA. *See Chavez*, 559 F.3d at 492 (collecting cases). Like other statutes of limitations, it can be equitably tolled. *See Jean*, 431 F.3d at 779; *Chavez*, 559 F.3d at 492-93 (quoting S. Rep. No. 102-249, at 10-11 (1991)). Statutes of limitations, however, should be strictly enforced:

> Mere ambient conflict in another country does not, by itself, justify tolling for suits

> filed in the United States. From the standpoint of the United States, many countries oppress their citizens today, and many countries have oppressed their citizens in decades and centuries past. A lenient approach to equitable tolling would revive claims dating back decades, if not centuries, when most or all of the eye witnesses would no longer be alive to provide their accounts of the events in question.

Arce, 434 F.3d at 1265 (circumstances of the case justified the equitable tolling of the statute of limitations).

* * *

The pre-and post-*Sosa* cases cited above reflect that case law addressing ATS and TVPA claims already contains multiple strands of doctrine that can be used to dispatch cases that lack legal merit, or to obtain, and be guided by, the views of the executive branch where foreign relations might be adversely affected. At present, existing doctrine seems ample to serve both the purposes for which Congress enacted the ATS and the TVPA, and the limits to those claims that this Court has discerned Congress surely intended. The Court's decision in *Sosa* has led to careful consideration of ATS/TVPA claims so as to serve Congress's varied intentions. *Amici* are doubtful that the FSIA needs to be wrenched past its plain wording to serve ends that at present are well-served by other doctrines applicable to these cases.

CONCLUSION

Regardless of how the Court decides the question presented, it should maintain the effectiveness of the Alien Tort Statute and the Torture Victims Protection Act of 1991, as previously construed by this Court, in providing justice, and genuine remedies, for those harmed by torture or violations of fundamental human rights abuses while, at the same time, protect the ability of lower courts to dismiss meritless claims brought for political or other improper purposes.

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AMICUS CURIAE BRIEF

No. 08-1555

IN THE
Supreme Court of the United States

MOHAMED ALI SAMANTAR,

Petitioner,

v.

BASHE ABDI YOUSUF, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF *AMICI CURIAE* DOLLY FILÁRTIGA, SISTER DIANNA ORTIZ, AND OTHER TORTURE SURVIVORS AND THEIR FAMILY MEMBERS, HUMAN RIGHTS ORGANIZATIONS, RELIGIOUS ORGANIZATIONS, AND TORTURE SURVIVORS SUPPORT ORGANIZATIONS IN SUPPORT OF THE RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*

Amici curiae respectfully submit this brief pursuant to Supreme Court Rule 37 in support of the Respondents.[1]

The *amici curiae* (listed individually in Appendix A to this brief) are:

(a) former plaintiffs who have secured some measure of justice for their own torture and that of their family members through suits against former foreign government officials under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, and the Torture Victim Protection Act of 1991 ("TVPA"), Pub. L. No. 102-256, 106 Stat. 73 (reproduced at 28 U.S.C. § 1350 note);

(b) non-profit organizations dedicated to providing health and social services to survivors of torture and other severe human rights abuses;

(c) human rights organizations committed to abolishing torture through legal means and policy advocacy, including but not

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than the *amici curiae*, their members, or their counsel made a monetary contribution to this brief's preparation or submission. The parties have consented to the filing of this brief and such consents have been lodged with the Court.

limited to litigation under the ATS and the TVPA; and

(d) religious organizations opposed to torture on moral grounds and committed to ensuring that the ATS and the TVPA continue to protect their members serving communities overseas.

The *amici curiae* oppose the use of torture under any circumstances and support the efforts of torture survivors to hold their perpetrators accountable. Thus, the *amici curiae* work to prevent the United States from serving as a safe haven for torturers.

SUMMARY OF ARGUMENT

Congress passed the Torture Victim Protection Act of 1991 ("TVPA"), Pub. L. No. 102-256, 106 Stat. 73 (reproduced at 28 U.S.C. § 1350 note), to ensure that U.S. courts could hear suits by torture survivors against former officials of foreign governments. Indeed, Congress understood and intended that the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq.*, would not bar such actions. In a substantial line of cases beginning thirty years ago with the seminal *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), which was cited with approval by this Court in *Sosa v. Alvarez-Machaín*, 542 U.S. 692 (2004), torture survivors have obtained relief in U.S. courts. Survivors have relied upon two acts – the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, and the

TVPA – to initiate suits against their abusers, including former government officials.

In asserting that the FSIA "should be construed to include individuals acting in an official capacity on the state's behalf," Pet. Br. 17, Petitioner proposes that this Court adopt a rule that would result in presumptive FSIA immunity for former officials who have committed torture and other severe human rights violations. Petitioner's contention would have staggering implications for torture survivors. Automatic immunity for former officials would strip individuals, including American citizens like *amicus* Sister Dianna Ortiz, of the access to justice that Congress carefully crafted in enacting the TVPA. An American nun working as a missionary with impoverished communities in Guatemala, Sister Ortiz was abducted, raped, and otherwise tortured in 1989 by soldiers under the direction of the Minister of Defense, Hector Gramajo. *Xuncax v. Gramajo*, 886 F. Supp. 162, 173-74 (D. Mass. 1995). Petitioner would deny survivors like Sister Ortiz the opportunity to seek redress in U.S. courts and would fundamentally undermine the legislative and judicial endorsement of the principle that "torturers and death squads will no longer have a safe haven in the United States." S. Rep. No. 102-249, at 3 (1991).

This outcome would effectively eviscerate the TVPA, unraveling the relief that Congress understood the ATS to provide and deliberately extended to American citizens, as well as aliens, in enacting the TVPA. Instead, this Court should read the FSIA,

which on its face does not confer immunity upon former officials, to be consistent with the plain language of the TVPA and the ATS, as well as with the underlying purposes for which Congress enacted these statutes. Thus, this Court should conclude that former officials are not immune from suit under the FSIA.

Should this Court determine that the FSIA may apply to former officials, however, that holding would not result in a finding that Petitioner is immune. Rather, remand would be required to determine whether Petitioner acted within the scope of his lawful authority. The Fourth Circuit did not reach this issue, *Yousuf v. Samantar*, 552 F.3d 371, 377 n.3 (4th Cir. 2009), and it is not before this Court. Scope-of-authority analysis is an essential component of any immunity inquiry. Every Circuit that has found that the FSIA extends to individuals has further held that officials are eligible for immunity *only* when acting within the scope of their lawful authority. Such an inquiry requires an examination of whether violations of *jus cogens* norms are ever lawful and whether the acts alleged were legal and authorized under local law. In undertaking such an analysis, a court must not give undue weight to submissions of a foreign state purporting to authorize, on a post hoc basis, an official's illegitimate acts.

To ensure that torture survivors continue to be afforded the access to U.S. courts that Congress enshrined in the TVPA and that the courts have recognized for thirty years under the ATS, this Court

should reject Petitioner's claim that former officials are automatically entitled to FSIA immunity. Such a result would permit abusive regimes to immunize the most heinous acts of former officials and deny justice to the very individuals Congress passed the TVPA to protect, including American students brutalized while overseas, relief workers targeted while on vital aid missions, and U.S. government personnel – civilian or military – tortured while on foreign assignments.

ARGUMENT

I. IN PROVIDING TORTURE SURVIVORS WITH A TVPA CAUSE OF ACTION AGAINST INDIVIDUALS, CONGRESS UNDERSTOOD - AND COURTS HAVE CONFIRMED - THAT FORMER OFFICIALS ARE NOT IMMUNE FROM SUIT

Petitioner's brief ignores the TVPA and the ATS entirely and thus overlooks the statutory remedies provided by Congress for torture survivors, such as *amicus* Sister Ortiz. In asserting that automatic immunity applies to all former officials,[2] Petitioner

[2] *Amici* agree with Respondents that the FSIA does not apply to individual officials, much less to former officials. *See generally* Resp't Br.; *see also* Part II.A *infra*. However, should this Court determine that the FSIA may apply to former officials, it should remand for further analysis of whether the alleged acts were taken within the scope of Petitioner's lawful authority. *See* Part II.B *infra*.

would rewrite the TVPA to render it effectively void upon passage, subvert congressional intent that the FSIA and the TVPA be read consistently, and have this Court overturn decades of jurisprudence.

A. Endorsing landmark ATS cases – *Filártiga v. Peña-Irala* and *Forti v. Suárez-Mason* – Congress codified relief for torture survivors, including American citizens

In passing the TVPA, Congress codified the principle established in *Filártiga* that torture survivors can seek justice in U.S. courts against individual perpetrators. *See* S. Rep. No. 102-249, at 3-4, 7-8; H.R. Rep. No. 102-367, at 4 (1991). The TVPA creates a statutory cause of action against "an individual" who commits torture or extrajudicial killing "under actual or apparent authority, or color of law, of any foreign nation." 28 U.S.C. § 1350 note. Congress envisioned that the TVPA would offer a remedy to a broad range of potential victims who could not bring an action under the ATS by virtue of their U.S. citizenship, including American students, relief workers, missionaries, federal agents, and military personnel. *See* Torture Victim Protection Act of 1989: Hearing on S. 1629 and H.R. 1662 Before the Subcomm. on Immigration and Refugee Affairs of the S. Comm. on the Judiciary, 101st Cong. 66 (1990) (statement of Sen. Arlen Specter) (describing the statute as one way to "protect our drug agents, wherever they are. . . . [T]hese are heinous and horrendous acts and

wherever we can move against them, we should."). Thus, Petitioner's approach would undermine a crucial legislative purpose explicitly enshrined in the TVPA: to protect American officials and citizens overseas.

In enacting the TVPA, Congress specifically referenced *Filártiga* to illustrate the heinous nature of the violations at issue. S. Rep. No. 102-249, at 3-4; H.R. Rep. No. 102-367, at 3-4. The *Filártiga* court labeled torturers the "enemy of all mankind." *Filártiga*, 630 F.2d at 890. In that case, *amicus* Dolly Filártiga, along with her father Joel, successfully sued a former Paraguayan Inspector General of Police for kidnapping and torturing to death her younger brother. *Id.* at 878. The Senate Report cited *Filártiga* as evidence of a "universal consensus" that "[o]fficial torture . . . violate[s] standards accepted by virtually every nation." S. Rep. No. 102-249, at 3. The Report also noted that the TVPA would "establish an unambiguous basis" for the cause of action in *Filártiga* and "extend a civil remedy also to U.S. citizens who may have been tortured abroad." *Id.* at 4-5. *See also* H.R. Rep. No. 102-367, at 3 (noting that U.S. treaty obligations require it "to adopt measures to ensure that torturers are held legally accountable for their acts," including through the provision of "means of civil redress to victims of torture"); *Kadić v. Karadžić*, 74 F.3d 377, 378 (2d Cir. 1996) ("Congress has made clear that its enactment of the [TVPA] was intended to codify the cause of action recognized by this Circuit

in *Filártiga*, even as it extends the cause of action to plaintiffs who are United States citizens.").

This Court has likewise understood the TVPA to indicate Congressional support for the result in *Filártiga*. *See Sosa*, 542 U.S. at 731 (describing the TVPA as "supplementing the judicial determination" made in *Filártiga* and as expressing Congressional approval of the result). This Court also endorsed the analysis employed in *Filártiga* and treated it as a paradigmatic ATS case in which relief for human rights violations should be available. *See id.* at 732 (citing *Filártiga* as "generally consistent with the reasoning of many of the courts and judges" in ATS and TVPA cases).

The Senate Report on the TVPA also endorsed *Forti v. Suárez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987), an ATS case in which survivors and their next of kin sued a former Argentine general responsible for torture and summary execution committed by military and police forces under his control. S. Rep. No. 102-249, at 4. In adopting the TVPA, therefore, Congress confirmed that liability attaches to former high-ranking officials with command responsibility over human rights violations. *Id.* at 8-9 ("[R]esponsibility . . . extends beyond the person or persons who actually committed those acts [to] anyone with higher

authority who authorized, tolerated or knowingly ignored those acts.").[3]

Congress stated that the FSIA would not normally bar suits alleging torture by former officials. *See id.* at 7-8 ("Because all states are officially opposed to torture and extrajudicial killing, however, the FSIA should normally provide no defense to an action taken under the TVPA against a former official."); H.R. Rep. No. 102-367, at 5. That Congress explicitly endorsed existing ATS cases in which torture survivors held former foreign officials to account demonstrates its understanding that former officials, including high-ranking individuals, would be subject to suit under the TVPA, notwithstanding the FSIA.

B. The FSIA should be construed consistently with the TVPA so as not to render the TVPA effectively void upon passage

Accepting Petitioner's argument that the FSIA automatically affords immunity to former officials for acts of torture and summary execution would render the TVPA effectively void. This Court should not endorse such a result. Prior to enacting the TVPA,

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[3] The principle of command responsibility is well established in TVPA cases. *See, e.g., Hilao v. Estate of Marcos* ("*Marcos III*"), 103 F.3d 767, 776-78 (9th Cir. 1996) (citing *In re Yamashita*, 327 U.S. 1, 14-16 (1946)); *Ford v. Garcia*, 289 F.3d 1283, 1288-90 (11th Cir. 2002); *Gramajo*, 886 F. Supp. at 171-74; *Doe I v. Liu Qi*, 349 F. Supp. 2d 1258, 1328-34 (N.D. Cal. 2004).

Congress made clear that it viewed that statute as consistent with the FSIA. *See* S. Rep. No. 102-249, at 6 ("[O]nly individuals may be sued. Consequently, the TVPA is not meant to override the [FSIA].").

Principles of statutory construction have long advised that "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *see also United States v. Borden Co.*, 308 U.S. 188, 198 (1939). As this Court has instructed,

> At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings. The classic judicial task of reconciling many laws enacted over time, and getting them to make sense in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute. . . . [A] specific policy embodied in a later federal statute should control [a court's] construction of the [earlier] statute, even though it ha[s] not been expressly amended.

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 143 (2000) (citations and internal quotation marks omitted). Thus, even if the FSIA might conceivably be interpreted, as Petitioner contends, to encompass former foreign officials, the imperative of

reconciling the TVPA with the FSIA counsels against such a reading.

The express terms of the TVPA, as well as its legislative history, make clear that Congress sought to provide torture victims with a remedy. *See* Part I.A *supra*. While courts have posited that interpreting the FSIA to cover individual former government officials does not eviscerate the TVPA,[4] these courts have overstated the applicability of the FSIA's enumerated exceptions. Further, these courts offer no example or explanation of how claims for torture or extrajudicial killing would fit within one of the FSIA exceptions. Relief under the TVPA would be largely illusory if plaintiffs' claims must conform to one of the exceptions to avoid dismissal.[5] While the waiver and

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[4] *Belhas v. Ya'alon*, 515 F.3d 1279, 1288-89 (D.C. Cir. 2008); *Matar v. Dichter*, 500 F. Supp. 2d 284, 293 (S.D.N.Y. 2007), *aff'd without reaching the issue*, 563 F.3d 9 (2d Cir. 2009).

[5] Indeed, under such a regime, TVPA claims that numerous circuit and district courts have upheld as viable would, in fact, fail. *See, e.g., Chávez v. Carranza*, 559 F.3d 486 (6th Cir. 2009) (affirming jury verdict under TVPA against former officer in the armed forces of El Salvador), *cert. denied*, *Carranza v. Chávez*, 130 S. Ct. 110 (U.S. Oct. 5, 2009); *Arce v. García*, 434 F.3d 1254 (11th Cir. 2006) (affirming judgment in favor of Salvadoran refugees against former members of Salvadoran military); *Marcos III*, 103 F.3d 767 (permitting suit against former Philippine president to proceed); *Lizarbe v. Rondon*, 642 F. Supp. 2d 473 (D. Md. 2009) (holding that former lieutenant in Peruvian army is not protected by FSIA immunity); *Liu Qi*, 349 F. Supp. 2d at 1279-88 (deciding that individual local government officials in China can be held accountable under TVPA for torture and other acts contrary to Chinese law); *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189 (S.D.N.Y. 1996) (denying motion to dismiss by

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terrorism exceptions may provide plaintiffs with an avenue for relief in an extremely limited number of circumstances,[6] the other exceptions are irrelevant in the paradigmatic TVPA case. Claims predicated on the commercial activities, takings, or rights in property exceptions are facially inapplicable. 28 U.S.C. §§ 1605(a)(2)-(4). The noncommercial tort exception is limited to torts occurring in the United States, while the TVPA is meant to address torture committed abroad. *Id.* § 1605(a)(5). Thus, under an interpretation requiring plaintiffs to meet one of the FSIA's exceptions, neither the claim of Dolly Filártiga nor that of Sister Ortiz would have survived.

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former Ghanaian official and noting that he could be held liable under TVPA for acts of torture that occurred outside of his scope of authority).

[6] The waiver exception would provide relief in very few cases since waiver requires an affirmative act on the part of the state. 28 U.S.C. § 1605(a)(1). For example, at the time of Sister Ortiz's lawsuit, defendant Gramajo, like other military officers involved in human rights violations in Guatemala, still had the support of the country's ruling parties. *See* Jennifer Schirmer, *The Guatemalan Military Project: A Violence Called Democracy* 265-66 (1998). Thus, waiver would have been an impossibility.

The terrorism exception is limited to acts by a designated state sponsor of terrorism, of which there are currently four – Cuba, Iran, Sudan, and Syria – countries whose citizens are unlikely to travel to the United States. Moreover, this exception is available only to a limited set of claimants, namely U.S. nationals, members of the U.S. armed forces, and U.S. government employees. 28 U.S.C. §§ 1605A(a)(2)(A)(i)(I), 1605A(a)(2)(A)(ii).

C. A long line of cases permits torture survivors to seek justice and hold former officials accountable in U.S. courts

In their landmark case, *amicus* Dolly Filártiga and her father brought an ATS suit against a former Paraguayan Inspector General of Police for kidnapping and torturing to death Ms. Filártiga's younger brother, Joelito, in retaliation for their father's political activism. *Filártiga*, 630 F.2d at 878-79. After Joelito's killing was publicized in the news media, Ms. Filártiga and her mother were arrested on false charges. *See* Dolly Filártiga, *American Courts, Global Justice*, N.Y. Times, Mar. 30, 2004, at A21. When the Filártigas tried to bring a case against Joelito's murderer in Paraguay, their lawyer was arrested, threatened, and shackled to a wall; he subsequently had his law license revoked. *Id.*

Before the Paraguayan dictator Alfredo Stroessner fell from power, the Filártigas filed their ATS case upon learning that Peña-Irala had been residing in the United States.[7] For the Filártigas, the ATS case was risky, but, as *amicus* Filártiga has observed, it also gave them protection: "the Paraguayan government threatened us but wouldn't risk retaliating once we had the American legal system on our

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[7] The Filártigas filed suit in 1978. *Filártiga*, 630 F.2d at 879. Stroessner seized power in a 1954 *coup d'état* and ruled for thirty-five years until being deposed in 1989.

side." *Id.* In 2004, Ms. Filártiga wrote about the importance of the case and the ATS:

> [S]urvivors or victims' relatives have used this law to obtain a measure of justice. . . . [Without the law,] torturers like Américo Peña-Irala would be able to travel freely in the United States. Deposed dictators like Ferdinand Marcos and brutal generals like Carlos Vides Casanova, who presided over human rights abuses in El Salvador in the 1980's, could come here and enjoy safe haven. *Id.*

Ms. Filártiga also reported that in Paraguay, the case had become "a symbol of the injustice of the Stroessner dictatorship." *Id.* Yet if the rule championed by Petitioner here had been followed in *Filártiga*, Peña-Irala would have received immunity. Not only would *amicus* Filártiga and her father have been denied justice for the kidnapping, torture, and murder of their family member, but also the line of subsequent cases endorsed by this Court could never have come to pass. *Sosa*, 542 U.S. at 731-32.

Amicus Sister Ortiz exemplifies the paradigmatic case that Congress contemplated when passing the TVPA. Nearly a year after traveling from a Kentucky convent to a poor rural province in Guatemala to conduct missionary work, Sister Ortiz received threats that prompted her to leave the country temporarily.[8]

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[8] Ortiz felt she was targeted "not because she was any kind of radical but simply because she was a garden-variety

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Gramajo, 886 F. Supp. at 173. Shortly after resuming her work two months later, Sister Ortiz was kidnapped from the garden of a religious center and taken, in a National Police patrol car driven by a uniformed policeman, to an unlit room where she was interrogated. *Id.* at 173-74. Sister Ortiz's captors punched her in the face, seared her skin more than one hundred times with cigarettes, and raped her repeatedly, causing her to black out intermittently. *Id.* at 174 & n.7. Upon her escape and return to the United States, Sister Ortiz filed claims against Gramajo under the TVPA. *Id.* at 173, 178.

The court held that Ortiz had "properly" used the TVPA against the former official because the "statute unambiguously provides victims of torture with a private cause of action against the perpetrators of such abuse" and immunity is "unavailable in suits against an official arising from acts that were beyond the scope of the official's authority." *Id.* at 175-76. Thus, the court aptly recognized that Congress passed the TVPA on the understanding that FSIA immunity would not apply to former officials charged with actionable violations under the TVPA. Under Petitioner's proposed immunity rule, however, Sister

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Catholic missionary working with the poor at a time when the military wanted to seriously scare the church." Donna Minkowitz, *"The Blindfold's Eyes" by Dianna Ortiz*, Salon.com, Nov. 19, 2002, http://dir.salon.com/story/books/review/2002/11/19/ortiz/ (book review).

Ortiz's suit against the former Guatemalan Minster of Defense would have been dismissed.

Other torture survivors have also used the TVPA and the ATS to hold abusive former officials to account. In *Arce v. García*, 434 F.3d 1254 (11th Cir. 2006), Salvadoran refugees abducted and tortured by members of the El Salvador National Guard – who subjected them to electric shocks, sodomy, and asphyxiation – obtained redress against the former Minister of Defense and former Director General of the National Guard, both of whom had since gained permanent residency in the United States. In *Chávez v. Carranza*, 413 F. Supp. 2d 891 (W.D. Tenn. 2005), a naturalized American citizen received relief against a former Salvadoran official, then living in Memphis, who was responsible for her torture and rape while she was a student at the National University of El Salvador. In *Cabello v. Fernández-Larios*, 402 F.3d 1148 (11th Cir. 2005), survivors of a Chilean economist who had been tortured and extrajudicially killed were able to obtain a measure of relief in a suit against a former Chilean military official residing in Miami. In *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002), torture survivors won a judgment against a former Bosnian Serb soldier then residing in Georgia. In *Jean v. Dorélien*, 431 F.3d 776 (11th Cir. 2005), a federal jury found a former Haitian colonel who had moved to Florida liable for extrajudicial killing and torture. In *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996), a former high-ranking Ethiopian official, discovered living in Atlanta, was

held liable under the ATS for the torture of three women during Ethiopia's military dictatorship of the 1970s.

Petitioner's approach to former-official immunity would have rendered all of these defendants – former foreign government officials involved in brutal abuses – untouchable. Each of these cases followed from the *Filártiga* precedent and gave survivors, or family members of those killed, access to justice in U.S. courts. Yet under Petitioner's proposed rule, all of these plaintiffs would have been denied the relief Congress sought to provide by codifying *Filártiga* in the TVPA.

II. THE FSIA DOES NOT IMMUNIZE OFFICIALS ACTING OUTSIDE THE SCOPE OF THEIR LAWFUL AUTHORITY, AND REMAND IS APPROPRIATE BECAUSE THIS QUESTION IS NOT BEFORE THIS COURT

Even if immunity extends to former officials, Petitioner is not entitled to immunity for any acts, such as torture and extrajudicial killing, that contravene *jus cogens* norms and are thus necessarily outside the scope of his lawful authority. Every Circuit that has held that an official – current or former – has immunity under the FSIA has made clear that this immunity extends *only* to acts committed within the scope of his lawful authority; acts beyond legal authority are not immunized. *See, e.g.*, *Chuidian v.*

Philippine Nat'l Bank, 912 F.2d 1095, 1106 (9th Cir. 1990).[9]

In short, a court must consider whether Petitioner was lawfully authorized to commit torture and other abuses. It cannot find his actions were taken in an official capacity by focusing solely on his status as an official at the time of the conduct alleged. *See Barr v. Matteo*, 360 U.S. 564, 573-74 (1959). Petitioner's failure to acknowledge the distinction between official capacity and scope of authority is glaring in its omission. Pet. Br. 43-45. In thoroughly assessing whether immunity exists, a court must determine, first, what authority a state has *actually* granted to an official and, second, what authority domestic and international law permit a state to grant *lawfully* to an official. These issues were never considered by the Fourth Circuit and are not before this Court. Should

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[9] *See also In re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d 71, 83 (2d Cir. 2008); *Keiler v. Cent. Bank of Nig.*, 277 F.3d 811, 815 (6th Cir. 2002); *Byrd v. Corporación Forestal y Industrial de Olancho S.A.*, 182 F.3d 380, 388-89 (5th Cir. 1999); *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1027 (D.C. Cir. 1997).

Where an officer's acts exceed the scope of his legal authority, he is not immune, because the acts are "not th[ose] of an agency or instrumentality of a foreign state within the meaning of FSIA." *Hilao v. Estate of Marcos* ("*Marcos II*"), 25 F.3d 1467, 1470 (9th Cir. 1994). In claiming, based on pre-FSIA common law, that officials are immune even if they exceed their lawful authority, Pet. Br. 30, Petitioner utterly ignores both the holding and the rationale of the *Chuidian* line – the only case law suggesting that individuals are entitled to immunity under the FSIA.

this Court determine that the FSIA applies to former officials, remand is therefore appropriate for analysis of whether Petitioner was acting within the scope of his lawful authority.

A. The FSIA does not immunize former officials

Those Circuits that have interpreted the FSIA to apply to individuals have reasoned that an officer can be considered an "agency or instrumentality of a foreign state," 28 U.S.C. § 1603(b), when acting in an official capacity and within the scope of his lawful authority. *See, e.g.*, *Chuidian*, 912 F.2d at 1099-102; *In re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d 71, 81 (2d Cir. 2008).[10] Even if this Court were to accept this reasoning for current officials, however, the FSIA does not immunize former officials. *See generally* Resp't Br.[11]

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[10] Petitioner argues that an individual official should be equated with the state itself. *See generally* Pet. Br. *Amici* have found no case to support this proposition.

[11] The FSIA itself does not state that immunity would extend to individual officials of foreign governments. 28 U.S.C. § 1603(b) (referring only to foreign states and their "agenc[ies] and instrumentalit[ies]"). A plain reading of the FSIA would not have the statute apply to individuals. *See Samantar*, 552 F.3d at 379-81; *Enahoro v. Abubakar*, 408 F.3d 877, 881-82 (7th Cir. 2005) ("If Congress meant to include individuals acting in the official capacity in the scope of the FSIA, it would have done so in clear and unmistakable terms."), *vacated for settlement by Abiola v. Abubakar*, 2008 U.S. Dist. LEXIS 2937 (N.D. Ill. Jan.

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In *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), this Court endorsed "the longstanding principle that the jurisdiction of the Court depends upon the state of things at the time of the action brought." *Id.* at 478 (citations and internal quotation marks omitted). This Court held that, in a suit against a defendant that is potentially an agency or instrumentality, such status – and thus the applicability of FSIA immunity – is determined "at the time suit is filed," not "at the time of the conduct giving rise to the suit." *Id.* at 478-79.

In *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), this Court confirmed that, under *Dole*, "whether an entity qualifies as an 'instrumentality' of a 'foreign state' for purposes of the FSIA's grant of immunity depends on the relationship between the entity and the state at the time suit is brought rather than when the conduct occurred." *Id.* at 698; *see id.* at 708 (Breyer, J., concurring) ("[T]he legal concept of

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15, 2008); *Tachiona v. United States*, 386 F.3d 205, 221 (2d Cir. 2004) (noting with respect to 28 U.S.C. § 1603(b) that "'agencies [and] instrumentalities' . . . are defined in terms not usually used to describe natural persons"), *cert. denied*, 547 U.S. 1143 (2006).

In *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), this Court also noted a distinction between suits against individual foreign officials and those against foreign states. *Id.* at 436 n.4. The Court cited *Filártiga*, a suit "against a Paraguayan police official for torture" in which "the Paraguayan Government was not joined as a defendant," to demonstrate that jurisdiction could be exercised against an individual official under the ATS without implicating the FSIA. *Id.*

sovereign immunity, as traditionally applied, is about a defendant's *status* at the time of suit, not about a defendant's *conduct* before the suit.") (emphasis in original). Thus, even if individual officials acting within the scope of their authority may be considered agencies or instrumentalities, *Dole* instructs that FSIA immunity would not extend to former officials.

B. Remand is appropriate if this Court determines that former officials are protected by the FSIA

While it is necessary for Petitioner to show that the FSIA extends immunity to *former* officials, it is not sufficient. As noted above, courts have made clear that an immunity analysis necessarily requires assessing whether an alleged act was undertaken within the scope of lawful authority. *See, e.g.*, *Chuidian*, 912 F.2d at 1106-07. Indeed, if automatic conferral of immunity to former officials were the rule, *Filártiga* and its progeny would never have been possible.

As Petitioner concedes, because the Fourth Circuit determined that former officials were not immune under the FSIA, it did not reach the question of whether Petitioner acted within the scope of his lawful authority. Pet. Br. 15-16. The Fourth Circuit specifically did not address whether the acts alleged here were violations of universally accepted international norms that could ever be within the scope of an official's lawful authority. *Samantar*, 552 F.3d at

377 n.3. Thus, even if this Court were to find for Petitioner on both of the Questions Presented, the proper course would be to remand to determine whether, as a legal and factual matter, the acts he is alleged to have committed fell within the scope of his lawful authority.

Ignoring this procedural posture, Petitioner asserts that a finding by this Court that the FSIA applies to suits against former officials for their official-capacity acts would establish that *he* is actually entitled to FSIA immunity. Pet. Br. 43-44. Thus, Petitioner suggests that this Court may presume his acts were within the scope of his official authority – and therefore lawful – simply because he took those acts in his role as an official and because the Somali Transitional Federal Government ("TFG") has stated that the actions alleged in the complaint "would have been taken by Mr. Samantar in his official capacit[y]." *Id.* at 10, 12 (citation and internal quotation marks omitted). Although this Court should not reach this question, Petitioner is mistaken. Assuming *arguendo* that former officials have some immunity under the FSIA, they are not immune for violations of *jus cogens* norms. *See* Part II.C *infra*. Additionally, a court must consider whether the given act was legal in the jurisdiction where it took place. *See* Part II.D.1 *infra*.

The inquiry in *Chuidian* and its progeny focuses on whether a defendant's acts were within the lawful realm of his duties. *Chuidian* made clear that a government official would not be entitled to sovereign

immunity "for acts not committed in his official capacity" or "acts beyond the scope of his authority." 912 F.2d at 1106. Thus, the FSIA does not immunize acts that "the sovereign has not empowered the official to do." *In re Estate of Ferdinand Marcos Human Rights Litig.* ("*Marcos I*"), 978 F.2d 493, 497 (9th Cir. 1992). Immunity also would not apply to "the illegal conduct of government officials," *Hilao v. Estate of Marcos (In re Estate of Ferdinand Marcos Human Rights Litig.)* ("*Marcos II*"), 25 F.3d 1467, 1472 n.7 (9th Cir. 1994), or to acts that could not have been legally authorized. *See Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1028 (D.C. Cir. 1997) (finding that, although defendant might have been authorized to make payments, he could not have been authorized to make "corrupt bargains"); *Keller v. Cent. Bank of Nig.*, 277 F.3d 811, 815 (6th Cir. 2002) (observing that *Chuidian* considered whether defendant was authorized to perform the types of acts alleged). The mere fact that an official acted under color of law is not sufficient. *Marcos II*, 25 F.3d at 1470-71 (finding former president acting under color of authority, but not within lawful mandate, not entitled to FSIA immunity); *see also Velasco v. Gov't of Indon.*, 370 F.3d 392, 398-400 (4th Cir. 2004) (noting that unauthorized acts, even if taken under color of law, cannot be imputed to foreign state). In short, remand is necessary for a court to consider whether Petitioner acted within the scope of his lawful authority.

C. Violations of *jus cogens* norms can never be within the scope of lawful authority

Assuming that the FSIA does apply to former government officials, immunity would not attach to violations of *jus cogens* norms, because such acts can never be within the lawful scope of an official's authority. A *jus cogens* or "peremptory norm" is one "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted." Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 332. *Jus cogens* norms "enjoy the highest status within international law." *Comm. of U.S. Citizens Living in Nicar. (CUSCLIN) v. Reagan*, 859 F.2d 929, 935 (D.C. Cir. 1988).

The acts alleged by Respondents, including torture, extrajudicial killing, crimes against humanity, and war crimes, violate *jus cogens* norms and were prohibited under international law at the time the FSIA was enacted.[12] *Amici* agree with *amicus curiae*

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[12] *See Siderman de Blake v. Republic of Arg.*, 965 F.2d 699, 714 (9th Cir. 1992) (noting that torture is violation of *jus cogens* norm); *Nguyen Thang Loi v. Dow Chem. Co. (In re Agent Orange Prod. Liab. Litig.)*, 373 F. Supp. 2d 7, 133-37 (E.D.N.Y. 2005) (quoting Cherif Bassiouni, *Crimes Against Humanity, in Crimes of War: What the Public Should Know* 107, 107-08 (Roy Gutman & David Rieff, eds., 1999) (observing that norm prohibiting crimes against humanity is *jus cogens* and has existed in customary international law for over half a century)); *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgement, ¶ 153 (Dec. 10,

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the Anti-Defamation League ("ADL") that "[i]t is self-evident that, because no state can ever derogate from such a peremptory norm of international law, officials who violate such norms are acting outside their lawful capacity." ADL Br. 6.[13] Thus, in *Marcos II*, the Ninth Circuit found that the estate of former President Marcos was not immune because his "acts of torture, execution, and disappearance were clearly acts outside of his authority as President" and "were not taken within any official mandate." 25 F.3d at 1472. Even as president, Marcos could not lawfully "authorize" violations of *jus cogens* norms.[14] International law

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1998) (same); Restatement (Third) of the Foreign Relations Law of the United States, § 702 cmt. n (1987) (stating that prohibition of torture is a *jus cogens* norm).

[13] The ADL is also correct that there is no need to expand the FSIA to constrain the ATS and the TVPA because a variety of existing doctrines already limit liability to the narrow categories Congress intended. ADL Br. 9. The ADL errs, however, in suggesting that the Court can or should opine on any of these doctrines in this case. *Id.* at 10. Only the scope of the FSIA is at issue here, not the scope of the ATS or the TVPA.

[14] *Accord Enahoro*, 408 F.3d at 893 (Cudahy, J., dissenting) ("[O]fficials receive no immunity for acts that violate international *jus cogens* human rights norms (which by definition are not legally authorized acts.)"); *Cabiri*, 921 F. Supp. at 1198 (noting that defendant could not argue that torture fell within the scope of his lawful authority or was permitted under his nation's laws because no government claims legitimate authority to torture).

The Senate Report on the TVPA confirmed that a state cannot legally authorize torture when it noted that the U.S. Government "does not regard authorized sanctions that unquestionably violate international law as 'lawful sanctions' exempt

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confirms that acts in violation of *jus cogens* norms cannot fall within the scope of an official's authority because they cannot be considered sovereign acts.[15] Accordingly, even if Petitioner were correct, which he is not, that "an individual's entitlement to sovereign immunity for official acts flows from the sovereign nature of those acts," Pet. Br. 43, such a result would not assist him here.

Concluding that violations of *jus cogens* norms are inherently outside the scope of an official's lawful authority and thus not covered by sovereign

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from the prohibition on torture." S. Rep. No. 102-249, at 6-7 (quoting Letter from Janet G. Mullins, Assistant Sec'y of State for Legis. Affairs, to Sen. Claiborne Pell, Chairman of the S. Comm. on Foreign Rel'ns (Dec. 11, 1989)).

[15] *See, e.g., Siderman*, 965 F.2d at 718 ("International law does not recognize an act that violates *jus cogens* as a sovereign act."); *Prosecutor v. Milošević*, Case No. IT-02-54-PT, Decision on Preliminary Matters, ¶ 32 (Nov. 8, 2001) ("'He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law.'" (quoting Nuremberg Judgement, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10)); *Furundžija*, Case No. IT-95-17/1-T, at ¶ 155 ("The fact that torture is prohibited by a peremptory norm of international law . . . delegitimize[s] any legislative, administrative or judicial act authorising torture."); *R. v. Bow Street Metro. Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3)*, [2000] 1 A.C. 147, 278 (1999) (Opinion of Lord Millett) ("International law cannot be supposed to have established a crime having the character of a jus cogens and at the same time to have provided an immunity which is coextensive with the obligation it seeks to impose.").

immunity does not require a finding that the FSIA includes a *jus cogens* exception.[16] Since the acts of an individual outside his lawful authority are not those of the state, the FSIA simply is not triggered. "No exception to [the] FSIA thus need be demonstrated." *Marcos II*, 25 F.3d at 1472. By contrast, a suit against a *state* for a violation of *jus cogens* norms would require an exception because a state falls within the "foreign state" scope of the FSIA regardless of the nature of the acts. *Id.* at 1471-72 (distinguishing *Siderman*, 965 F.2d at 718, which found Argentina immune from suit for torture).[17] Accordingly, FSIA

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[16] *Amici*, however, agree with the ADL that "Congress likely intended to incorporate a *jus cogens* exception into 28 U.S.C. § 1605(a)(1)." ADL Br. 8.

[17] Thus, the D.C. Circuit erred in holding that because "the FSIA contains no unenumerated exception for violations of *jus cogens* norms" a former official was immune from claims alleging such violations. *Belhas*, 515 F.3d at 1287. Likewise, Petitioner's reliance on *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), is misplaced. Pet. Br. 6. *Nelson* addressed plaintiffs' assertion that a *state* could be held liable for torture under 28 U.S.C. § 1605(a)(2) because the suit was "'based upon a commercial activity carried on in the United States.'" 507 U.S. at 356 (quoting 28 U.S.C. § 1605(a)(2)). This Court held that the state was immune from suit for torture because "[e]xercise of the powers of police and penal officers is not the sort of action by which private parties can engage in commerce." *Id.* at 362. Thus, this Court's statement that "a foreign state's exercise of the power of its police has long been understood *for purposes of the restrictive theory* as peculiarly sovereign in nature," *id.* at 361 (emphasis added), simply has no bearing on whether a state can authorize an officer to commit such acts within the scope of his lawful authority. Indeed, in suits against individuals, courts have

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jurisprudence does not require a scope-of-authority analysis when the state *itself* is the defendant.

Petitioner is simply wrong in claiming that international law supports immunity for former officials who committed violations of *jus cogens* norms. Pet. Br. 6.[18] Indeed, international law requires that the United States hold a person residing within its territory accountable for acts of torture, rape, and murder, and contains no exception for government officials. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. 5, 14, Feb. 4, 1985, S. Treaty Doc. 100-20 (1988), 1465 U.N.T.S. 85. Moreover, international law's provision of universal jurisdiction over torture, crimes against humanity, and war crimes "allow[s] every nation's courts to adjudicate foreign conduct involving foreign parties in such cases." *Sosa*, 542 U.S. at 772 (Breyer, J., concurring); *see also United States v. Yousef*, 327 F.3d 56, 106 (2d Cir. 2003) (noting that war crimes and crimes against humanity give rise to universal

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often held that abuses are not official "acts of state." *See, e.g.*, *Marcos II*, 25 F.3d at 1471; *Filártiga*, 630 F.2d at 889-90.

[18] *See, e.g.*, Charter of the International Military Tribunal art. 7, August 8, 1945, 59 Stat. 1546 *et seq.*, 82 U.N.T.S. 280 ("The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment."); Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 art. 7(2), May 25, 1993, 32 I.L.M. 1159 (same).

jurisdiction).[19] Any notion that former officials are immune is utterly inconsistent with this principle.

D. Even if a violation of *jus cogens* norms could be within the scope of authority, a court must consider whether the alleged acts actually were within the scope of lawful authority and specifically authorized

The *jus cogens* inquiry does not end a court's scope-of-authority analysis. *See, e.g.*, *Marcos II*, 25 F.3d at 1470-72 (conducting scope-of-authority analysis); *Gramajo*, 886 F. Supp. at 175-76 (same); *Doe I v. Liu Qi*, 349 F. Supp. 2d 1258, 1287 (N.D. Cal. 2004) (same). While acts in violation of *jus cogens* can never be lawful, this result does not mean that any act not in violation of *jus cogens* is automatically legal. A scope-of-authority analysis is still required in assessing whether immunity applies.

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[19] *Furundžija*, Case No. IT-95-17/1-T, at ¶ 156 (noting that universal jurisdiction lies over torture by virtue of its *jus cogens* status).

1. A court must consider whether Petitioner acted outside the scope of his lawful authority under Somali law

Even if the acts at issue were not violations of *jus cogens* norms, a court must still consider the scope of the authority that Somalia actually granted to Petitioner. The initial step of this analysis requires consideration of whether the acts were legal under Somali law. Other considerations include the nature of the alleged acts (i.e., public or private) and whether they were specifically endorsed and authorized by the official's state. Since the lower court never undertook such analysis, *Samantar*, 552 F.3d at 377 n.3, remand is appropriate on these issues.

Chuidian recognized that "'[w]here the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do.'" 912 F.2d at 1106 (quoting *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949)). Other courts have reached similar conclusions, including in the context of egregious human rights abuses.[20] This

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[20] For example, the *Liu Qi* court looked to the foreign state's law to determine whether officials accused of torture acted within the scope of their authority. 349 F. Supp. 2d at 1285. The court stated that a defendant is not immune if he did not act in his official capacity *or* acted outside the scope of his authority *or* if the acts were not validly authorized (i.e., legal). *Id.* at 1282. It further concluded that the defendants were not immune under

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is not an "exception" to the FSIA because, where an individual defendant has not acted within the scope of his lawful authority, the suit is not against an instrumentality of the state. *See Marcos II*, 25 F.3d at 1472.

Accordingly, no court can determine that Petitioner is, in fact, immune without a particularized

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the FSIA from TVPA and ATS claims because the alleged conduct was "not validly authorized under Chinese law." *Id.* at 1266, 1287 ("Where, as here, [China] appears to have covertly authorized but publicly disclaimed the alleged human rights violations caused or permitted by Defendants Liu and Xia and asserts that such violations are in fact prohibited by Chinese law, Defendants cannot claim to have acted under to [sic] a valid grant of authority for purposes of the FSIA."). *See also Cabiri*, 921 F. Supp. at 1198 (determining that defendant could not claim acts of torture fell within scope of authority or were permitted under Ghanaian law).

In *Belhas*, the D.C. Circuit erred in declining to consider plaintiffs' claims that the defendant acted outside the scope of his lawful authority because he allegedly violated domestic law, based on its conclusion that the FSIA "does not create an exception for alleged violations of a foreign state's laws." 515 F.3d at 1288. Further, in failing to conduct an analysis of the foreign state's domestic law when it evaluated whether the defendant was acting in his official capacity, the court overlooked a critical component of the scope-of-authority analysis. The court erred in concluding that the acts in question were immunized based solely on a letter submitted by a foreign government that declared those acts were taken in the defendant's official capacity. *See id.* at 1283-84 (determining that defendant acted within scope of authority on basis of letter from Israel). This reasoning conflicts with other courts' scope-of-authority analysis, which assesses both whether the individual was acting within his official capacity and whether the authority was *lawful*. In short, the *Belhas* court simply ignored the latter inquiry by failing to assess Israeli domestic law.

analysis of his actual authority in light of Somali law at the time of the alleged abuses. If Somali law did not authorize Petitioner to commit the acts alleged, he cannot be immune. Thus, even if Petitioner were to prevail in his assertion that the FSIA extends to former officials, this Court should remand the case for a determination of whether Somali law actually authorized the alleged human rights violations.

2. A court must not give undue weight to a vague foreign government submission

Petitioner relies on letters from the Somali TFG as a basis for asserting immunity. Pet. Br. 43-45. This Court should not consider the import, if any, of such letters because the issue of whether Petitioner was acting within the scope of his lawful authority was neither addressed by the Fourth Circuit nor included in the Questions Presented. Regardless, Petitioner's reliance on the letters is misplaced.

The purpose of the FSIA was to ensure that courts would make immunity decisions "'on purely legal grounds and under procedures that insure due process,'" without regard to case-by-case diplomatic pressures. *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 488 (1983) (quoting H.R. Rep. No. 94-1487, at 7 (1976)). Petitioner's proposal would have the Court disregard this purpose. Instead, he suggests that letters from the Somali TFG would suffice as a basis for immunity, predicated solely on the letters'

assertion that he acted under the color of law in his official capacity when he presided over torture and other abuses that gave rise to this suit. Pet. Br. 43-45. A proper analysis, however, would also include an examination of whether Petitioner's acts fell within the scope of his lawful authority.

Deferring to the litigation position of a foreign government is directly contrary to the FSIA's purpose. Indeed, such deference would be even more problematic than the untenable diplomatic situation that the FSIA was created to resolve. Rather than understanding the FSIA to remove courts' reliance on discretionary decisions by the Executive to yield to or resist diplomatic pressure, Petitioner would confer a veto power upon foreign states which they could invoke directly in U.S. courts against suits authorized by U.S. law. Permitting governments to secure immunity for torturers in the United States by merely sending a letter would also contradict the congressional policies enshrined in the TVPA and the ATS. *See* Part I.A *supra*. Courts may not afford such deference to a foreign government at the expense of a duly enacted statute.[21]

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[21] U.S. courts regularly adjudicate cases despite objections from foreign nations: "Federal judges cannot dismiss a case because a foreign government finds it irksome, nor can they . . . tailor their rulings to accommodate the expressed interests of a foreign nation that is not even a party." *Patrickson v. Dole Food Co.*, 251 F.3d 795, 803 (9th Cir. 2001) (considering whether federal question jurisdiction existed), *aff'd on other grounds*, 538 U.S. 468 (2003).

Amici do not assert that a letter from a foreign government may *never* be relevant to a court's determination of whether the acts of a particular official were within the scope of lawful authority. However, in considering whether official authority existed, a court must assess *for itself* the content of foreign law. *See* Fed. R. Civ. P. 44.1 (noting that determination of foreign law "must be treated as a ruling on a question of law"). A government's statement may provide useful evidence of foreign law by describing applicable statutes, regulations, court decisions, and the like. *Id.* ("In determining foreign law, [a district] court may consider any relevant material or source, . . . whether or not submitted by a party or admissible under the Federal Rules of Evidence."). Such a letter would essentially have the status of an *amicus curiae* brief regarding the operative law. However, a government's statement is not itself law and thus cannot retroactively grant authority.[22]

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[22] This Court considered a similar issue in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976), in applying the act of state doctrine. There, this Court held that the "litigating position" of the Cuban Government was insufficient to establish an act of state and that Cuba would have needed instead to show that a "statute, decree, order, or resolution" demonstrated that Cuba had taken an official sovereign act. *Id.* at 691-92 n.8, 694-95. An inquiry into the scope of authority, like that into whether an act is an act of state, requires assessment of controlling law. Accordingly, a court cannot conclude, based solely on a foreign government's *ipse dixit*, that the acts in question were committed within an officer's scope of lawful authority, any more than it can conclude that a case involves an act of

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The letters provided by the Somali TFG fall well short of establishing that Petitioner engaged in legal and authorized activities. They merely state in vague terms that "'the actions attributed to Mr. Samantar in the lawsuit in connection with the quelling of the insurgencies from 1981 to 1989 *would have been* taken by Mr. Samantar in his official capacities.'" *Yousuf v. Samantar*, No. 04-1360, 2007 U.S. Dist. LEXIS 56227, at *35 (E.D. Va. Aug. 1, 2007) (emphasis added).[23]

Thus, even if this Court were to consider the letters, which it should not, statements that merely assert legal conclusions without providing legal authority hold no value.[24]

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state based on such a statement. To the extent that *Belhas* deviated from these principles in affording deference to a foreign government's letter, it is not persuasive. 515 F.3d at 1283-84.

[23] Indeed, the letters contradict Somalia's contemporaneous denials that it engaged in or approved human rights abuses. *See, e.g.*, Abdikarim Ali Omar, *Letter to the Editor*, Wash. Post, Mar. 21, 1990, at A20 (Somali Ambassador to the United States stating that "Somalia upholds the human rights of its citizens.").

[24] Nor can these letters be treated as factual evidence that any act was actually taken within Petitioner's scope of lawful authority. There is no indication, for example, that the authors of these letters have any personal knowledge of Petitioner's acts. Moreover, the letters are hearsay. If such "statements were proof of anything, [plaintiffs] would [be] entitled to cross-examine [the author] under oath." *Dunhill*, 425 U.S. at 692 n.8.

CONCLUSION

To ensure that survivors of torture continue to have access to justice in U.S. courts, this Court should reject Petitioner's argument and hold that FSIA immunity does not extend to former government officials.

Respectfully submitted,

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January 27, 2010

APPENDIX A

LIST OF *AMICI CURIAE*

I. FORMER PLAINTIFFS IN ALIEN TORT STATUTE ("ATS") AND TORTURE VICTIM PROTECTION ACT ("TVPA") CASES

Dolly Filártiga and her younger brother Joelito lived in Asunción, Paraguay, in 1976, with their mother and father, a long-time opponent of Paraguay's dictator, General Alfredo Stroessner. That year, her brother was abducted and later tortured to death by Américo Norberto Peña-Irala, the Inspector General of Police of Asunción. Dolly Filártiga was forced out of her house in the middle of the night to view her brother's mutilated body. After her arrival in the United States, she sued Peña-Irala under the ATS in New York, becoming the first plaintiff to successfully use the statute to seek justice for human rights violations. In 1984, she and her father were awarded over $10 million in damages.

Amaryllis Hilao-Enríquez was a medical student when Ferdinand Marcos declared martial law in the Philippines. Like many activists of the period, she was arrested in 1972 but escaped. The authorities then targeted her sister, Liliosa, who was tortured to death two days after her arrest and became the first woman to die at the hands of the military after the declaration of martial law. Her brutal death raised concern in the international community about the Marcos dictatorship. Hilao-Enríquez helped found

the Society of Ex-Detainees against Detention and for Amnesty ("SELDA"), an organization that seeks justice for individuals arrested and tortured by the Marcos regime. She is currently SELDA's Secretary General as well as the National Chairperson of the Karapatan Alliance for the Advancement of Peoples' Rights, which documents human rights violations committed by the state and assists survivors in seeking justice. Hilao-Enríquez's parents were lead plaintiffs in the successful case to compensate thousands of Filipinos for the human rights violations that they suffered under Marcos.

Hilda B. Narciso was working as a church activist in the Philippines when, on March 24, 1983, she was detained, raped, and tortured by soldiers during the period of martial law declared by then-President Marcos. When Marcos left the Philippines and came to Hawaii in 1986, Narciso served as a class representative in a human rights suit against him. From 1994 to 2002, she served as the Executive Director of Claimants 1081 Inc., a human rights organization based in Manila that advocates on behalf of survivors of torture and the families of those who were executed or disappeared between 1972 and 1986, during martial law in the Philippines.

Sister Dianna Ortiz, a native of New Mexico, is a U.S. Roman Catholic nun of the Ursuline order. In 1982, while serving as a missionary teaching literacy and religion to indigenous peoples in Guatemala, she was kidnapped, raped, and tortured by government forces under the command of Guatemalan Minister of

Defense, Hector Gramajo. In 1995, Ortiz won a judgment under the TVPA against Gramajo, who was by then a retired officer. She subsequently founded *amicus* Torture Abolition and Survivors Support Coalition International ("TASSC"). Ortiz thus has both a personal and a professional interest in ensuring that survivors of torture continue to have access to justice under the TVPA in suits against former foreign officials.

II. HUMAN RIGHTS ORGANIZATIONS

The **Allard K. Lowenstein International Human Rights Clinic** ("Lowenstein Clinic") is a Yale Law School course that gives students first-hand experience in human rights advocacy under the supervision of international human rights lawyers. The Lowenstein Clinic undertakes many litigation and research projects on behalf of human rights organizations and individual victims of human rights abuses. Its work is based on the human rights standards contained in international law. The Lowenstein Clinic has conducted research and provided briefs for international tribunals and many courts in the United States, has done work on cases involving the definition of torture under the TVPA, and has acted as counsel for plaintiffs in many lawsuits under the ATS.

Amnesty International is a worldwide movement of people who campaign for internationally recognized human rights to be respected and protected

for everyone. The organization believes human rights abuses anywhere are the concern of people everywhere. Outraged by human rights abuses but inspired by hope for a better world, Amnesty International works to improve people's lives through campaigning and international solidarity. Its mission is to conduct research and generate action to prevent and end grave abuses of human rights and to demand justice for those whose rights have been violated. Members and supporters exert influence on governments, political bodies, companies, and intergovernmental groups. Activists take up human rights issues by mobilizing public pressure through mass demonstrations, vigils, and direct lobbying as well as online and offline campaigning. Amnesty International started campaigning in 1961 and today has more than 2.2 million members, supporters, and subscribers in over 150 countries and territories, in every region of the world.

EarthRights International is a human rights organization based in Washington, D.C., that litigates and advocates on behalf of victims of human rights abuses worldwide. EarthRights International is or has been counsel in several lawsuits under the ATS and the TVPA in which the acts of foreign government agents are at issue, and therefore has an interest in ensuring the correct application of immunity in cases involving international offenses.

Human Rights First is a non-profit, nonpartisan organization that has worked since 1978 to create

a secure and humane world by advancing justice, human dignity, and respect for the rule of law. Human Rights First supports human rights activists around the world, protects refugees in flight from persecution and repression, and helps build an international system of justice and accountability for human rights crimes. Human Rights First acts to halt catastrophic violations of human rights currently in progress and to support international efforts to ensure that states fulfill their responsibility to protect their people from gross violations of human rights.

Human Rights Watch is a non-profit organization established in 1978 that investigates and reports on violations of fundamental human rights around the world with the goal of securing the respect of these rights for all persons. It is the largest international human rights organization based in the United States. By exposing and calling attention to human rights abuses committed by state and non-state actors, Human Rights Watch seeks to bring international public opinion to bear upon offending governments and others and, thereby, to bring pressure on them to end abusive practices. Human Rights Watch has filed amicus briefs before various bodies, such as U.S. Courts of Appeals and the Inter-American Commission.

The **International Human Rights Clinic** at Harvard Law School ("the Clinic") provides law students an opportunity to gain first-hand experience with the practice of human rights through clinical work,

course work, applied research, and scholarship. The Clinic has represented victims and survivors of human rights violations in U.S. and international courts. The Clinic currently is co-counsel in *Mamani, et al. v. Sánchez de Lozada and Sánchez Berzaín*, an ATS case against the former president and minister of defense of Bolivia for their involvement in civilian killings in 2003. The Clinic has also served as counsel for *amici curiae* in other ATS and TVPA cases that have included claims for torture and extrajudicial killing.

International Rights Advocates protects and empowers individuals victimized by multinational corporations and other powerful entities that traditionally enjoy impunity or immunity. Designed to foster global operations that, at a minimum, conform to human rights principles, International Rights Advocates has litigated numerous suits involving claims brought under the ATS and the TVPA and has an interest in ensuring the correct application of immunity.

The World Organization for Human Rights USA ("Human Rights USA") is a non-profit, public interest human rights organization dedicated to ending torture, slavery, and gender-based violence, using litigation in the United States as the primary tool for accomplishing these goals. Human Rights USA's staff has extensive experience litigating issues regarding U.S. adherence to international human rights standards, as well as human rights norms incorporated into U.S. domestic law, particularly the Convention

Against Torture and its implementing legislation. This litigation has included civil actions under the ATS and the TVPA dealing with immunity questions and act of state issues. Human Rights USA is an affiliate of the World Organization Against Torture (Organisation Mondiale Contre La Torture ("OMCT")) network, composed of over 200 similarly situated human rights organizations around the world, each focusing on its own nation's human rights compliance issues and needs.

III. TORTURE SURVIVOR SUPPORT AND RECOVERY ORGANIZATIONS

The **Boston Center for Refugee Health and Human Rights** ("the Center"), located at the Boston Medical Center, provides comprehensive health care for refugees and survivors of torture and related trauma, coordinated with legal aid and social services. The Center also educates and trains agencies and professionals who serve this patient population to advocate for the promotion of health and human rights and to conduct clinical, epidemiological, and legal research for the better understanding and promotion of health and quality of life for survivors of torture and related trauma. The Center has an interest generally in promoting justice and holding perpetrators of torture to account and specifically in ensuring the proper interpretation of the TVPA in cases such as this one.

Global Lawyers and Physicians is a non-profit, non-governmental organization formed in 1996 to reinvigorate collaboration between the legal and medical/public health professions, in order to better protect the human rights and dignity of all persons. Global Lawyers and Physicians provides support and assistance in developing, implementing, and advocating public policies and legal remedies that protect and enhance human rights. As such, the organization has an interest in seeing that remedies created by Congress in the TVPA remain available to survivors of torture.

Survivors of Torture, International believes in the abolition of torture and the healing of torture survivors. A successful outcome in this case would be significant because holding torturers accountable is an essential part of the healing process for torture survivors. Additionally, cases like this one may help prevent future abuse by confirming that torture is a human rights violation that incurs consequences.

Torture Abolition and Survivors Support Coalition, International ("TASSC") is the only organization founded by and for torture survivors. The mission of TASSC is to end the practice of torture wherever it occurs and to empower survivors, their families, and communities. TASSC demands an end to impunity for the architects of torture – those who order, justify, and practice it – and thus has an interest in ensuring that U.S. courts properly construe immunity and the TVPA in cases involving former officials.

IV. RELIGIOUS ORGANIZATIONS

Consistent Life joins this brief of *amici curiae* because of its commitment to the protection of all human life. In addition to the threat to life from summary or extrajudicial executions related to torture, Consistent Life is especially concerned about the need for protection of vulnerable activists who, for example, advocate for the poor, for the rights of women or racial minorities or people with disabilities or unborn children, or who are active in preventing executions, abortions, or war.

The Maryknoll Global Concerns Office represents Maryknoll, the U.S.-based Catholic missionary movement, in advocating before governments and international bodies for human rights protections in national and international law and practice and for an end to impunity for human rights abusers. Maryknoll includes: the Maryknoll Fathers and Brothers, the Maryknoll Sisters, the Maryknoll Lay Missioners, and the Maryknoll Affiliates. Maryknoll missioners work in about 40 countries around the world and have on many occasions accompanied victims of human rights abuse and survivors of torture, including a number of our own members.

The Muslim Public Affairs Council ("MPAC") is a public service agency working for the civil rights of American Muslims, for the integration of Islam into American pluralism, and for a positive, constructive relationship between American Muslims and their elected representatives. MPAC was created in 1988 to

promote a vibrant American Muslim community and enrich American society through exemplifying the Islamic values of Mercy, Justice, Peace, Human Dignity, Freedom, and Equality for all. MPAC has an interest in ensuring that, in cases such as this one, which offers the opportunity to realize justice and to safeguard human dignity, U.S. courts protect and promote these most basic values.

Pax Christi USA is a national Catholic social justice organization reaching more than half a million Catholics annually. Pax Christi USA strives to create a world that reflects the Peace of Christ by exploring, articulating, and witnessing the call of Christian nonviolence. Pax Christi USA commits itself to peace education and, with the help of its bishop members, promotes the gospel imperative of peacemaking as a priority in the Catholic Church in the United States.

The Shalom Center was founded in 1983 to bring a prophetic voice to Jewish, multireligious, and American life. From the earliest memories of Pharaoh's cruelty, the Jewish experience is that high officials of oppressive regimes have been responsible for ordering the use of torture; Judaism itself has long sought to construct a legal system in which torture would be impossible and in which high officials would be accountable to the public. Based on this collective experience, the Shalom Center has an interest in ensuring that in cases such as this one, the law is applied in such a way as to make domestic and international norms against torture enforceable.

AMICUS CURIAE BRIEF

No. 08-1555

IN THE

Supreme Court of the United States

MOHAMED ALI SAMANTAR,

Petitioner,

v.

BASHE ABDI YOUSUF, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE FOREIGN MINISTER FOR THE REPUBLIC OF SOMALILAND, ABDILLAHI MOHAMED DUALE, AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae Abdillahi Mohamed Duale is the Minister of Foreign Affairs for the Republic of Somaliland. Mr. Duale has served the government of Somaliland almost since its formation in 1991, first as Minister of Finance and later as Minister of Information. Mr. Duale was appointed Minister of Foreign Affairs in 2006. As Foreign Minister, Mr. Duale manages Somaliland's relations with other nations and works to establish foreign policy. Foreign Minister Duale respectfully submits this brief in support of Respondents, and urges the Court to affirm the decision of the U.S. Court of Appeals for the Fourth Circuit.[1]

Somaliland was declared an autonomous democracy after the fall of the Siad Barre regime, and the collapse of the central government of Somalia, an unfortunate union imposed upon disparate clans and provinces after the withdrawal of the colonial powers of Britain and Italy. The Isaaq clan is an ethnic majority in Somaliland. However, the Isaaq were a disfavored minority in greater Somalia, where they were the particular targets of torture and other human-rights abuses under the dictatorship of Siad Barre. The people of Somaliland opposed those abuses, prompting a forceful reaction by the Barre regime. When the government of Somalia

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[1] Counsel for both parties have consented to the filing of this brief, and their consents have been filed with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or his counsel made a monetary contribution to its preparation or submission.

later collapsed, Somaliland did not secede. Somaliland simply reverted to the colonial boundaries defining the protectorate originally drawn by Britain. In an internationally-monitored referendum held in Somaliland in 2001, 66% of the qualified votes were cast in favor of a sovereign Somaliland and 97% approved the Somaliland constitution. Somaliland has its own currency and its own rule of law.

Somaliland, however, still awaits recognition as an independent state by the international community. While Somaliland is committed to peaceful and open relations with Somalia, its bid for international recognition is hindered by the ongoing chaos that marks Somali society.

Meanwhile, the flagrant crimes of the Siad Barre regime against the people of Somaliland have not been addressed in a court of law. Petitioner and his cohorts have fled to the United States and other foreign nations. While their crimes violated Somali and international law—indeed, are condemned in every known articulation of the law—there is no treaty enabling Petitioner's extradition to face trial in Somaliland. Moreover, there is no mechanism for the victims of his human-rights abuses to obtain a civil remedy from a United States resident in a Somaliland court. If they do not receive a measure of justice in the United States courts, they will receive no justice at all.

SUMMARY OF ARGUMENT

Torture, extrajudicial killings and the arbitrary detention of Somali citizens were all expressly forbidden by the constitution that created the government of the Democratic Republic of Somalia. Such acts therefore could not possibly have been perpetrated under any legitimate authority granted to the sovereign government of Somalia or its public officials. Under these circumstances, the doctrine of sovereign immunity does not apply.

The United States Congress has enacted statutes providing the victims of human-rights abuses a remedy when the perpetrators of those abuses are found within the confines of this country's borders. It is essential that the judicial process envisioned by the United States Congress be permitted to go forward so the efforts to achieve peace and reconciliation in Somaliland and throughout the region can be realized. More importantly, it is essential that the rule of law be applied to the perpetrators of international human-rights abuses when they are found within the borders of the United States.

ARGUMENT

The Foreign Minister of the Republic of Somaliland respectfully appears in this Court to express the ardent support of the government and people of Somaliland for the United States judicial system's legal authority to hold a former official of the Somali government, now a resident of Virginia, financially responsible for the arbitrary detention, extrajudicial killings and torture he inflicted on others, in violation of United States,

Somali and international law. The critical importance of a judicial remedy for these human-rights abuses cannot be overstated. Indeed, the process of reconciliation and prospects for peace in eastern Africa and throughout the world depend upon the knowledge of our fellow citizens that no one is above the law and there is no refuge in the United States, or anywhere else, for those who flagrantly violate the basic human rights established by the international community and guaranteed by the Constitutions of the United States, the Republic of Somaliland and the Somali Democratic Republic. The ability of a society that was traumatized by years of human-rights abuses to move forward constructively into the future depends upon the confidence that all will be held accountable under the rule of law no matter what their former official status may have been.

Somaliland has consistently supported the efforts of Somali torture victims to seek legal redress from any former government official now living beyond the reach of Somali law but within the jurisdiction of the United States courts. On June 2, 2007, *amicus curiae* Duale wrote to U.S. Secretary of State Condoleezza Rice on behalf of the people and government of Somaliland in support of these legal proceedings which were then going forward in the United States District Court for the Eastern District of Virginia. J.A. 109. On March 3, 2005, Mr. Duale's predecessor, Mrs. Edna Adan Ismail, wrote to another official in the U.S. State Department to express Somaliland's view that no other feasible means existed for Petitioner's victims to secure redress for their suffering other than through legal proceedings in the United States, where Petitioner now resides. J.A. 53-54.

Respect for the sovereignty of foreign nations is an important legal principle and the Somali people accept the doctrine of sovereign immunity. However, conduct by a former government official that was forbidden by the law of his own nation must be deemed inherently unauthorized and cannot be shielded by any rational notion of sovereign immunity. In particular, conduct that is explicitly condemned by the nation's constitution cannot possibly be authorized by the government formed by that very same constitution.

During the period that Petitioner served as a government official in the Somali Democratic Republic and perpetrated the acts of torture, extrajudicial killings and arbitrary detentions alleged in this case, the executive and legislative branches of the country were the creation of a constitution that expressly forbade such conduct. Constitution of the Somali Democratic Republic (reproduced at Pltfs. Opp. To Motion To Dismiss, Exh. 2). Therefore, it is not possible that Petitioner's illegal activities were authorized by the State. To the contrary, they were prohibited. Conduct that is condemned by the Somali Constitution is inherently *ultra vires* – a legal reality that cannot be reversed by the current pronouncements of Petitioner's political allies, even if they served in a bygone Transitional Federal Government.

Article 27 of the Somali Democratic Republic's Constitution, entitled "Security Of The Person Under Detention," expressly forbade torture of individuals detained by government authorities. Section 1 clearly stated that, "A detained person shall not be subjected

to physical or mental torture." *Id.* at Art. 27, § 1. Section 2 simply declared that, "Corporal punishment shall be prohibited." *Id.* at Art. 27, § 2. With these straightforward prohibitions, the Somali Constitution made it clear that any physical or mental torture inflicted upon a detained person under color of law could not be an authorized act of the Somali government. Indeed, the Constitution forbade corporal punishment of any sort, whether or not it amounted to torture.

Similarly, the Somali Constitution explicitly prohibited extrajudicial killings. Section 2 of the Constitution's Article 25 declared that only "the law shall determine the conditions in which the death sentence may be passed." *Id.* at Art. 25, § 2. In light of that clear constitutional proscription, there is simply no basis for any Somali government official to claim that a killing without any legal process can be cloaked with the authority of the sovereign Somali government.

Article 26 of the Somali Constitution forbade arbitrary detention of Somali residents by the government's security forces. Section 2 stated,

> No person shall be liable to any form of detention or other restrictions of personal liberty, except when apprehended in *flagrante delicto* or pursuant to an act of the competent judicial authority in the cases and in the manner prescribed by the law.

Id. at Art. 26, § 2. Section 3 stated,

> Any person who shall be detained on grounds of security shall without delay be brought before the judicial authority which has competence over the offence for which he is detained within the time limit prescribed by law.

Id. at Art. 26, § 3.

Finally, Somali government officials would have lacked any authority to act outside the bounds of international human-rights law, even if torture, extrajudicial killings and arbitrary detentions had not been explicitly condemned by the Somali Constitution. Article 19 of the same Constitution made this principle clear:

> The Somali Democratic Republic shall recognize the Universal Declaration of Human Rights and generally accepted rules of international law.

Id. at Art. 19. By directing the recognition of generally accepted rules of international law, the Somali Constitution also approved the well established international rule of command responsibility that renders Petitioner individually liable for any acts of torture or killing that he orchestrated and directed. *See, e.g., In re Yamashita*, 327 U.S. 1, 15-16 (1946).

The simple truth is that Somali public officials under Siad Barre were acting outside of any conceivable

sovereign authority if they engaged in human-rights abuses condemned by the Somali Constitution or the Universal Declaration of Human Rights. Because Petitioner has lived in the United States for over a decade, the Somali people have no present ability to hold him accountable, even though human-rights abuses committed under color of law were illegal in the Somali Democratic Republic. The Somali people and the victims of these crimes are now entirely dependent upon the United States courts to enforce the United States statutes that were specifically enacted for the protection of torture victims.

Mr. Duale, the official representative of the Republic of Somaliland, does not appear as an *amicus curiae* to seek any kind of extraordinary relief. The United States Congress enacted specific statutes expressly designed to provide a remedy to torture victims whose oppressors seek to avoid the judicial process of their own countries by hiding within the confines of the United States. With the enactment of these laws, the United States joined with the community of nations worldwide in condemning the abuse of basic human rights and declaring that there will be no refuge for the perpetrators of such abuses within their borders.

CONCLUSION

A decision stating that universally condemned conduct could possibly be the authorized act of a civilized sovereign authority would eviscerate the basic principles that underlie the foundations of all modern societies. The Republic of Somaliland and its people respectfully urge the Court to allow the judicial process envisioned by the United States Congress to proceed to its lawful conclusion.

Respectfully submitted,

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AMICUS CURIAE BRIEF

(8)

No. 08-1555

B455

IN THE

Supreme Court of the United States

MOHAMED ALI SAMANTAR,

Petitioner,

v.

BASHE ABDI YOUSUF ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF OF *AMICI CURIAE* FORMER ATTORNEYS GENERAL OF THE UNITED STATES IN SUPPORT OF PETITIONER

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BOTH 59UZII

QUESTIONS PRESENTED

1. Whether a foreign State's immunity from suit under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602 *et seq.*, extends to an individual acting in an official capacity on behalf of a foreign State.

2. Whether an individual who is no longer an official of a foreign State at the time suit is filed retains immunity under the FSIA for acts taken in the individual's former official capacity.

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STATEMENT OF INTEREST

Amici curiae submit this brief in support of Petitioner's argument that current and former foreign officials are immune from civil liability in United States courts under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602 *et seq.*[1]

Each of the three *amici curiae* has served as Attorney General of the United States. The Honorable Edwin Meese III served as the seventy-fifth Attorney General of the United States (February 1985 – August 1988, appointed by President Ronald Reagan). The Honorable Richard Lewis Thornburgh served as the seventy-sixth Attorney General of the United States (August 1988 – August 1991, appointed by President Ronald Reagan). The Honorable William Pelham Barr served as the seventy-seventh Attorney General of the United States (November 1991 – January 1993, appointed by President George H.W. Bush).

As former Attorneys General of the United States, *amici curiae* have a unique perspective on important governmental decisionmaking in the Executive Branch, and how the reliable availability of foreign sovereign immunity may affect such decisionmaking. Immunity from suits outside the United States allows Executive Branch officials to make difficult but necessary decisions without fear of

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[1] The parties have consented in writing to the filing of this brief. Counsel for *amici* authored this brief in its entirety. No counsel for a party authored this brief in whole or in part, and no counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than counsel for *amici* made a monetary contribution to the preparation or submission of this brief.

later civil liability under foreign legal standards. *Amici curiae* believe their unique experience as former Attorneys General will aid this Court in analyzing the potential effects of this case on United States officials.

SUMMARY OF ARGUMENT

This case is about the immunity of foreign officials from civil suit in the United States. From its first mention of the concept, this Court has recognized that foreign sovereign immunity is a matter of reciprocity, the "interchange of good offices," between Nations. *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812). The rule established in this case, we can expect, will be applied to the United States and its officials by foreign countries. As important, the decision of the highest court of the world's leading constitutional democracy undoubtedly will influence the course of foreign sovereign immunity in customary international law. This is also a case, therefore, about the immunity from civil suit that United States government officials will be afforded in foreign countries.

Equivalent immunity from civil suit for both foreign States and officials of foreign States acting in their official capacity is the long-standing tradition of international law. The resolution of this case will leave foreign officials either (1) immune from civil suit subject to exceptions defined in the FSIA; (2) subject to civil liability, absent an affirmative suggestion of immunity by the Department of State or a judicial determination of immunity, unaided by statutory directives or Executive Branch guidance; or (3) without sovereign immunity, in the event this Court determines that the FSIA both does not reach

officials and is the sole basis for foreign sovereign immunity in our courts.

As an initial matter, *amici curiae* believe that the first result, holding that the FSIA reaches foreign officials, is correct as a matter of statutory interpretation. Moreover, either of the latter two results would make the United States among the first nations to distinguish so starkly between foreign States and their officials with regard to the administration of foreign sovereign immunity. If reciprocally applied to United States officials by foreign countries, such rules would have serious consequences.

First, immunity from civil suit abroad would become unreliable. Before the enactment of the FSIA, the common law system placed emphasis on affirmative intervention by the State Department in determining a foreign official's immunity. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486-487 (1983). If strongly tied to the active intervention of foreign political leaders, immunity from civil suit abroad could hardly be taken for granted by United States officials in exercising their governmental responsibilities. Our officials must make decisions, in the interests of the United States, that are deeply unpopular in certain foreign countries. Often such decisions will necessarily advantage the citizens of some nations and injure the citizens of others. Intervention by foreign leaders to secure immunity for United States officials, all political considerations to the contrary, would be uncertain.

Second, considerations of civil litigation abroad—the costs of defending it, the restrictions on future travel, and the risk of a sizeable adverse judgment—may become another factor for United States officials

in making decisions on behalf of the American people. This Court has long recognized that immunity doctrines affect official action; if insufficiently protective, the threat of civil litigation will chill officials from taking decisive action and will influence the content and quality of governance. United States officials should seek guidance in clear domestic legal rules, made applicable to their actions by the Framers of our Constitution or the political branches, as interpreted by our courts. Because of the anticipated reaction of foreign countries, affirming the decision below may cause United States officials, reasonably, to look to other sources. How will a policy—perhaps with significant effects in a foreign country—fare in that country's legal system, judged under that country's laws? Predictable systems of foreign sovereign immunity provide confidence to United States officials that their actions will be judged primarily by the courts of this country, according to familiar procedures and substantive legal standards.

ARGUMENT

I. THE TERM "FOREIGN STATE" IN THE FSIA INCLUDES ITS OFFICIALS.

As a matter of statutory interpretation, *amici curiae* believe that the term "foreign state" includes its officials acting in their official capacity. The FSIA codified, with only explicit departures, the United States common law of sovereign immunity extant in 1976. *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 199 (2007). The common law reflected an international consensus—which has not changed—that a foreign State and officials acting on behalf of the State are indistinguishable for purposes of sovereign immunity. *See, e.g., Heaney v. Gov't of Spain*, 445 F.2d 501, 504

(2d Cir. 1971); *Underhill v. Hernandez*, 65 F. 577, 579 (2d Cir. 1895); *Jones v. Ministry of Interior of the Kingdom of Saudi Arabia*, [2006] UKHL 26, [2007] 1 A.C. 270, 275-76 (appeal taken from Eng.) (U.K.); *Grunfeld v. United States*, (1968) 3 N.S.W.R. 36 (Australia); *Rahimtoola v. Nizam of Hyderabad*, [1958] A.C. 379, 402 (H.L. 1957) (appeal taken from Eng.) (U.K.); *Syquia v. Almeda Lopez*, 84 Phil. Rep. 312 (1949) (Philippines); Restatement (Second) of Foreign Relations Law of the United States § 66(f) (1965). Against this backdrop, the term "foreign state" in the FSIA naturally includes the State's officials.

Immunizing a foreign State's officers draws on the long-standing justification for foreign sovereign immunity: comity between nations. *Republic of Austria v. Altmann*, 541 U.S. 677, 689 (2004). The essence of comity is a mutual respect for the adequacy of the foreign State's legal system—that a foreign sovereign's acts should not be tested in United States courts, according to United States legal principles. *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 763 (1972) (citing *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897)). As this Court has explained in the context of the related act of state doctrine, "[t]o permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly 'imperil the amicable relations between governments and vex the peace of nations.'" *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 417 (1964) (quoting *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 304 (1918)). Because a State acts only through its officers, limiting immunity to the State as such does little to protect sovereign acts from scrutiny in our courts. *Monell v. Dep't of Soc. Servs. of New York*,

436 U.S. 658, 690 n.55 (1978) ("[O]fficial-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent."). Every sovereign act could be reached through suits against officials.

Upending the long-standing equivalence of a State and its officers in sovereign immunity law also would undermine the principal objective of the FSIA. Under the common law, lawsuits directly attacking the actions of a foreign sovereign—through suits against the State or its officers—placed diplomatic and political pressures on the Executive Branch to suggest immunity. *See, e.g., Altmann*, 541 U.S. at 690; *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 487 (1983). The FSIA established a "comprehensive set of legal standards" to remove that pressure from the Executive Branch. *Verlinden*, 461 U.S. at 488. If those political pressures could be imposed again by a change in caption, naming the foreign government official responsible for a policy or action, the FSIA would have accomplished little. A statute should not be construed so dramatically to thwart its apparent purpose, and to modify rules of international law, without an explicit direction in the text. *See Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 178 n.35 (1993) (citing *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 117-18 (1804)).

Congress's express inclusion of an "agency or instrumentality of a foreign state" as part of a "foreign state" (28 U.S.C. § 1603(a)-(b)), without any reference to individual officials, complicates the question before this Court as a matter of statutory text. This feature of the FSIA was the principal basis of the decision below, which we believe was in error. Pet.

App. at 17a-20a. When measured against the international and common law rules of sovereign immunity in 1976, however, it becomes apparent that the detailed definition of a foreign State's "agency or instrumentality" served the needed purpose of clarifying a severe division of authority among both United States and foreign courts. Congress providing that the term "foreign state . . . *includes*" this clarifying definition of "agency or instrumentality" (28 U.S.C. § 1603(a)-(b) (emphasis added)) thus should not be understood to exclude a State's officers from the FSIA. *Cf. Fed. Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 99-100 (1941) (the term "'including' is not one of all-embracing definition, but connotes simply an illustrative example of the general principle").

That foreign States and their officers were entitled to symmetrical sovereign immunity was axiomatic among commentators and courts. What was controversial was the extent to which sovereign immunity reached corporations and organizations associated with the State, many of which had extensive commercial and financial activities. *See* Hazel Fox, *The Law of State Immunity* 436 (2d ed. 2008) (explaining the "unresolved conflict in state practice on what factors should be determinant of a link between an agency and the State to bring the former within the latter's immunity").[2] This judicial disagreement

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[2] The immunity of foreign-owned corporations was subject to multiple different tests and disparate outcomes in United States courts. *Compare S.T. Tringali Co. v. Tug Pemex XV*, 274 F. Supp. 227, 230 (S.D. Tex. 1967) (Pemex, a government-owned corporation, not immune by virtue of Mexican State ownership) *with F.W. Stone Eng'g Co. v. Petroleos Mexicanos of Mexico, D.F.*, 42 A.2d 57, 60 (Pa. 1945) (Pemex held immune based on

[Footnote continued on next page]

was aggravated in the decades leading to 1976, as the United States and other countries adjusted to the restrictive theory of sovereign immunity, excepting a foreign State's commercial activities from immunity. *See* Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Philip B. Perlman, Acting Att'y Gen., U.S. Dep't of Justice (May 19, 1952), *reprinted in* 26 Dep't of State Bulletin 984-85 (1952) (announcing United States adherence to the restrictive theory for the first time). In making explicit in the FSIA what degree of association would be required for an organization or corporation to be "include[d]" within the term "foreign state" (28 U.S.C. § 1603(a)-(b)), Congress resolved parts of that controversy. But Congress's determination of an outer perimeter question in sovereign immunity law did not silently negate the well-settled equivalence of a foreign State and its officials. *See Permanent Mission*, 551 U.S. at 198-99 (discussing congressional

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State Department suggestion of immunity). Likewise, courts in the United Kingdom struggled with the immunity of government-associated corporations. *See Trendtex Trading Corp. v. Cent. Bank of Nigeria*, [1977] 2 W.L.R. 356, 370, 1 QB 529, 559-60 ("But how are we to discover whether a body is an 'alter ego or organ' of the government? The cases on this subject are difficult to follow, even in this country: let alone those in other countries."). By 1976, continental Europe had reached no greater clarity on the question. *See* William C. Hoffman, *The Separate Entity Rule in International Perspective: Should State Ownership of Corporate Shares Confer Sovereign Status for Immunity Purposes?*, 65 Tul. L. Rev. 535, 547-51, 554-65 (1991) (describing the "disharmony" and "chaos" in lower court rulings regarding the immunity of state-associated corporations prior to 1976, as well as the wide variations on such immunity in Western European countries).

intent to incorporate the international law of immunity).

Importantly, the FSIA's definition of agency or instrumentality was more protective of corporations associated with foreign States than most other countries' immunity regimes. *See* William C. Hoffman, *The Separate Entity Rule in International Perspective: Should State Ownership of Corporate Shares Confer Sovereign Status for Immunity Purposes?*, 65 Tul. L. Rev. 535, 547-51 (1991) (explaining the "separate entity" rule from other jurisdictions, which the FSIA rejected). It makes sense that Congress would use express statutory terms to depart from a significant portion of international practice, and would accept the settled propositions tacitly. *See Permanent Mission*, 551 U.S. at 198-99.

II. ESTABLISHING RELIABLE SOVEREIGN IMMUNITY FOR FOREIGN OFFICIALS SERVES THE BEST INTERESTS OF THE UNITED STATES.

A. Affirming the Fourth Circuit's Decision Would Weaken Immunity For United States Officials Abroad.

Placing foreign officials outside the FSIA, and thus treating them differently from States in terms of sovereign immunity, would mark a significant departure from the well-established international law that the FSIA was intended to codify. A ruling from this Court establishing such a departure will affect the immunity United States officials receive abroad.

1. Should this Court embrace the minority view of circuit courts that sovereign immunity under the FSIA does not extend to foreign officials, the treatment of foreign States and their officials would radi-

cally diverge. Prior to the FSIA, United States courts afforded considerable deference to the State Department's suggestion of immunity in a particular case (*see Ex parte Republic of Peru*, 318 U.S. 578, 588-89 (1943)), and likewise would afford weight to the Department's refusal to file such a suggestion (*see Nat'l City Bank of New York v. Republic of China*, 348 U.S. 356, 360 (1955); *Compania Espanola de Navegacion Maritima, S.A. v. Navemar*, 303 U.S. 68, 74-75 (1938)).

This system proved "troublesome" because the State Department's practice of filing suggestions of immunity appeared unpredictable and based on diplomatic pressures and political considerations. *Verlinden*, 461 U.S. at 487-88. In other cases, when a foreign sovereign failed to request a suggestion of immunity from the State Department, courts were left to make their own decisions on immunity questions, drawing on the common law and the Department's previous recommendations. In still other cases, the State Department's silence in the face of a foreign government's request for intervention was damaging to a claim of immunity. *Nat'l City Bank of New York*, 348 U.S. at 360-61. Ultimately, sovereign immunity standards were "neither clear nor uniformly applied" (*Verlinden*, 461 U.S. at 488) and created "considerable uncertainty." H.R. Rep. No. 94-1487, at 9 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6607.

The FSIA reflected a clear recognition by both Congress and the Executive Brach that a problem

existed.[3] Through the statute, Congress freed the Executive Branch of the diplomatic pressures attending its immunity recommendations by transferring responsibility to the courts. Judicial administration of statutory standards would be more impartial, prompt, and predictable.

2. Interpreting the FSIA to exclude individual officials would represent a clear step backwards in the foreign sovereign immunity practice of the United States. Before and after the FSIA's enactment, international law and the practice of foreign countries have been well-settled that officials acting in their official capacity and the State are the same for immunity purposes. "The foreign state's right to immunity cannot be circumvented by suing its servants or agents." *Jones*, [2007] 1 A.C. at 281 (U.K.); *see also Grunfeld*, 3 N.S.W.R. 36 (Australia). A decision from the highest court of the world's leading constitutional democracy departing from this settled principle—and placing a State and its officers into a separate system—would be noted by foreign governments. Foreign governments are unlikely to miss the observations of this Court, Congress, and the Executive Branch that foreign sovereign immunity is uncertain and politically driven outside the FSIA. *See, e.g., Altmann*, 541 U.S. at 677-78; *Verlinden*, 461 U.S. at 488.[4]

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[3] President Gerald R. Ford strongly recommended passage of the FSIA. *See* 12 WEEKLY COMP. PRES. DOC. 1554 (Oct. 22, 1976).

[4] The approach urged by Respondents—that the FSIA forecloses any sovereign immunity for officials of foreign States would widen dramatically the gulf between the United States

[Footnote continued on next page]

3. Foreign countries will respond to changes in United States foreign sovereign immunity law. The doctrine of sovereign immunity rests on shared principles of comity and reciprocity. *See, e.g., Nat'l City Bank of New York*, 348 U.S. at 362 (doctrine of sovereign immunity derives "from standards of public morality, fair dealing, reciprocal self-interest, and respect for the 'power and dignity' of the foreign sovereign"); *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). *Cf. Boos v. Barry*, 485 U.S. 312, 323 (1988) ("[I]n light of the concept of reciprocity that governs much of international law in this area, we have a more parochial reason to protect foreign diplomats in this country. Doing so ensures that similar protections will be accorded those that we send abroad to represent the United States.") (internal citation omitted). Other nations also have long recognized that sovereign immunity is an exchange of legal protections between nations. *See Spanish Gov't v. Lambege et Pujol*, Cour de Cassation [Supreme Court of France] D. 1849 1, 5, 9 (translated and excerpted in Barry E. Carter & Philip R. Trimble, *International Law* 588 (2d ed. 1995)) ("[T]he reciprocal independence of States is one of the most universally respected principles of international law, and it follows as a result therefore that a government cannot be subjected to the jurisdiction of another against its will."). Following this tradition, when

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and the rest of the world. *See* Opp. to Cert. at 18-26; *but see Enahoro v. Abubakar*, 408 F.3d 877, 879 (7th Cir. 2005) (holding that the common law may continue to protect, to some degree, foreign officials). As explained below, the peril to United States officials and our system of government would be substantially aggravated by this potential alternative holding.

Congress adopted the FSIA, it sought to ensure that "U.S. immunity practice would conform to the practice in virtually every other country." H.R. Rep. No. 94-1487, at 7 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6606.

Accordingly, retreats from foreign sovereign immunity principles here weaken protections for United States officials abroad. In some cases, this effect is virtually automatic. The United Kingdom's sovereign immunity statute, for example, expressly provides that "the immunities and privileges conferred" by the Act may be restricted "in relation to any State" when they "exceed those accorded by the law of that State in relation to the United Kingdom." State Immunity Act, 1978, c. 33, § 15; *see also* State Immunity Act, R.S.C., ch. S-18, § 15 (1985) (Canada); State Immunity Act § 17 (1979) (Singapore); State Immunity Ordinance § 16 (1981) (Pakistan); Foreign States Immunities Act § 16 (1981) (South Africa). Likewise, nations with civil law systems, including France and Italy, "treat[] the conferment of immunity as subject to reciprocity." Fox, *The Law of State Immunity* 15. Resurrection of the pre-FSIA immunity regime in the United States, it should be expected, would ripple through the immunity laws of our international partners, with United States officials ultimately receiving less immunity protection in foreign jurisdictions.

B. Sovereign Immunity Rules Abroad Affect the Content and Quality of Decisionmaking By Our Government Officials.

The protections of foreign sovereign immunity are more than a matter of convenience for United States officials. The sovereign immunity protections

that we extend to foreign officials, and thereby reciprocally seek for United States officials abroad, will affect how we govern ourselves here at home.

1. Official immunity doctrines are designed to facilitate decisive government action, guided only by the interests of the American people and clearly defined legal rules established through constitutional processes. The abiding premise of these doctrines is that the prospect of future civil liability affects governmental decisionmaking. *Nixon v. Fitzgerald*, 457 U.S. 731, 752 n.32 (1982) ("Among the most persuasive reasons supporting official immunity is the prospect that damages liability may render an official unduly cautious in the discharge of his official duties."). Properly structured, immunity principles free government officials to make decisions about issues that "excit[e] the deepest feelings" in those they affect. *Bradley v. Fisher*, 80 U.S. 335, 348 (1871); *see also Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) ("[T]o submit all officials . . . to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute.").

To achieve these objectives, immunity protection must be predictable. Whatever the context, this Court has ensured that legal rules demarcating immunity are wholly discernable in advance. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982). Predictability in immunity avoids the paralyzing uncertainty of whether yet unknown standards will be applied. *Id.*; *see also Crawford-El v. Britton*, 523 U.S. 574, 590-91 (1998).

2. Foreign sovereign immunity for officials discharging their governmental duties historically has been absolute. Given the reciprocal nature of sover-

eign immunity, affirming the Fourth Circuit's decision likely would lead to United States officials no longer enjoying presumptive civil immunity abroad; they instead would have to rely on the active intervention of foreign political leaders to ensure immunity. Confidence in the United States Executive Branch to reach appropriate decisions on foreign official immunity may be well taken.[5] But United States officials may not be as sanguine about the willingness of foreign political leaders actively to intervene and secure immunity, especially in defense of unpopular United States policies. In the end, should a system similar to the Fourth Circuit's approach be applied to United States officials abroad, those officials will be less confident in protections from foreign civil suit challenging their decisions on behalf of the American people.

Reliable and predictable immunity from civil suit abroad is as or more important than domestic immunity. United States officials inevitably will make decisions with profound effects abroad. Citizens of foreign States will disagree with and be harmed by United States policy, especially as the Nation fights wars in two foreign theaters. And

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[5] No matter whether Executive Branch decisions ultimately are driven by discernable principles, the already expressed characterization of the pre-FSIA, common-law system as random, unreliable, and politicized (*see Altmann*, 541 U.S. at 689-91; *Verlinden*, 461 U.S. at 486-88), may substantially drive a perception of *ad hoc* decisions among our international partners. Surely, foreign officials—and their governments—disappointed by a particular Executive Branch decision to withhold a suggestion of immunity will have every incentive to press this caricature. *See Hirota v. MacArthur*, 335 U.S. 876, 878 (1948) (noting the importance of "appearance" in foreign affairs).

many foreign policy dilemmas faced by the United States are zero-sum, where any resolution will inevitably harm citizens of some countries and benefit others. It would be difficult to argue that subjecting foreign official immunity to uncertainty, and inviting reciprocal treatment of United States officials, would be in the interests of the United States.

As important, immunity from foreign civil suit *vel non* effectively changes the content of our law. If United Sates officials cannot rely on immunity from civil suit abroad, foreign legal rules, and the views of foreign courts on international law, understandably will affect their judgment. A chilling effect will follow, if only from the inherent difficulty in discerning the content of foreign law in advance.[6]

At a more fundamental level, foreign standards simply should not loom in the background of the decisions of United States officials. The law of foreign countries has not been made applicable to our government by any institution the Constitution authorizes to do so. *See generally Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). Reliable immunity from foreign suits "support[s] the rights of the people, by enabling their representatives to execute the functions of their office without fear" (*Tenney v. Brandhove*, 341 U.S. 367, 373-74 (1951)), and according only to the interests of the American people and the rules of law they establish through our constitutional democracy.

3. The effect on governmental decisionmaking in the United States is not outside this Court's ambit.

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[6] The analysis with respect to sovereign immunity in suits against former officials is no different. Decisive official decisionmaking is equally deterred if government officials lose immunity for their prior official actions upon leaving office.

To be sure, this Court has recognized that foreign sovereign immunity in United States courts "is not meant to avoid chilling foreign states or their instrumentalities in the conduct of their business." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 479 (2003); *see also Altmann*, 541 U.S. at 696. But it is equally apparent that the development of foreign sovereign immunity doctrine has been driven, in part, by the "reciprocal self-interest" in protecting United States officials from the chilling effect of potential foreign liability. *Nat'l City Bank of New York*, 348 U.S. at 362. This Court, therefore, should take account of how its decision will affect the structure of immunity regimes in foreign countries, which in turn affects United States official decisionmaking. *See Altmann*, 541 U.S. at 729-30 (Kennedy, J., dissenting) (immunity principles should account for how foreign States "shape their conduct" through diplomatic exchanges).

C. Application of the FSIA to Foreign Officials Does Not Foreclose Other Accountability Mechanisms.

It is important to bear in mind what is *not* at stake in this case—namely, the United States and other nations' ability to condemn or to sanction the actions of government officials through mechanisms other than private civil litigation. The FSIA governs civil suits by private litigants in United States courts. It does not circumscribe sovereigns' ability to utilize other mechanisms for holding officials accountable for their unlawful actions.

One such mechanism is criminal prosecution. The FSIA is not addressed to criminal proceedings. *See* 28 U.S.C. § 1330. Criminal prosecutions, in contrast to civil litigation, must be initiated by govern-

ment officials, who in most countries are accountable to leaders responsible for the nation's foreign affairs.

A foreign nation also may waive its officials' immunity in United States courts. For instance, in *In re Grand Jury Proceedings*, 817 F.2d 1108, 1110-11 (4th Cir. 1987), the Fourth Circuit concluded that former Philippine President Ferdinand Marcos and his wife Imelda Marcos were subject to civil proceedings in United States courts because the Republic of the Philippines had waived those individuals' immunity. *Id.* Similarly, a nation may enter into treaties that criminalize acts and simultaneously abrogate sovereign immunity for those acts. *See* Curtis A. Bradley & Jack L. Goldsmith, *Foreign Sovereign Immunity, Individual Officials, and Human Rights Litigation*, 13 Green Bag 2d 9, 22 (2009) (noting that countries can eliminate sovereign immunity through such treaties and conventions).

Nations also may negotiate compensation agreements to redress the injuries of their nationals at the hands of foreign officials. The United States has been party to a number of such agreements, including, for instance, the Iran-United States Claims Tribunal. *See Dames & Moore v. Regan*, 453 U.S. 654, 679-83 (1981) (affirming President Carter's settlement of claims arising from the Iran hostage crisis). More recently, the Libyan Claims Program negotiated between the Libyan and United States governments provided substantial compensation to the United States victims of terrorist attacks linked to the Libyan government. *See generally Libyan Claims Resolution Act*, Pub. L. No. 110-301, 122 Stat. 2999 (2009); *see also, e.g.*, 22 U.S.C. §§ 1621-1645 (describing the various settlement activities of the Foreign Claims Settlement Commission); Agreement Relating to the Agreement of Oct. 24, 2000 Concern-

ing the Austrian Fund "Reconciliation, Peace, and Cooperation," U.S.-Aus., Jan. 23, 2001, State Dep't No. 01-73, 2001 WL 935261 (settling claims with Austria).

At bottom, the objective of diplomacy is to shape the actions of foreign sovereigns to the interests of the United States and to right principles. Historically, this delicate task has been left to our political branches. At the heart of effective foreign relations are the selection of priorities and the identification of opportunities for progress. To that end, reliable foreign sovereign immunity against civil suit makes available to the American people the most effective, calibrated approach to channeling the conduct of foreign nations. Sovereign immunity principles vest the *State*—not private litigants—with the power to decide issues of liability for government acts, after the State has had opportunity carefully to consider the foreign policy implications of its decision and before litigation costs are incurred. *See* Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 Chi. J. Int'l L. 457, 460-64 (2001).[7] The burden of inertia always remains with sovereigns, who are accountable for the foreign policy consequences of their decisions, empowering them to keep diplomatic avenues open.

Subjecting foreign officials to the pre-FSIA common law system of sovereign immunity would be contrary to this principle. Congress and this Court have

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[7] The FSIA itself recognizes this principle by permitting the Executive Branch to lift civil immunity of the State and its officials for terrorism-related actions of a sovereign that the Executive Branchy has designated as a State sponsor of terrorism. *See* 28 U.S.C. § 1605A.

recognized that the mere filing of a lawsuit will place foreign policy pressure on the State Department to intervene, or not. In this way, the common law system vests foreign policy decisionmaking authority in private litigants, who lack the expertise and authority to decide such questions. *See Sosa*, 542 U.S. at 733 n.21; *Munaf v. Geren*, 128 S. Ct. 2207, 2226 (2008); *see also* Bradley, *supra*, at 460 ("The most significant cost of international human rights litigation is that it shifts responsibility for official condemnation and sanction of foreign governments away from elected political officials to private plaintiffs and their representatives."). Principles of immunity for foreign officials, statutorily defined in advance and administered by courts, reduce those diplomatic pressures and more firmly vest the initiation of State-to-State controversy with the officials our Framers intended to address foreign affairs.

CONCLUSION

The judgment of the Fourth Circuit should be reversed.

Respectfully submitted.

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December 7, 2009

AMICUS CURIAE BRIEF

No. 08-1555

In The Supreme Court of the United States

MOHAMED ALI SAMANTAR,

Petitioner,

v.

BASHE ABDI YOUSUF, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF FORMER UNITED STATES DIPLOMATS MORTON I. ABRAMOWITZ, J. BRIAN ATWOOD, HARRIET C. BABBITT, HARRY G. BARNES, JR., J.D. BINDENAGEL, JAMES BISHOP, JAMES L. BULLOCK, A. PETER BURLEIGH, HODDING CARTER III, GOODWIN COOKE, PATRICIA DERIAN, ROBERT S. GELBARD, WILLIAM C. HARROP, SAMUEL F. HART, JOHN L. HIRSCH, ALLEN HOLMES, PRINCETON N. LYMAN, MARILYN McAFEE, JAMES C. O'BRIEN, THOMAS R. PICKERING, LAURENCE E. POPE, DAVID J. SCHEFFER, JOHN SHATTUCK, PAUL K. STAHNKE, ALEXANDER F. WATSON AND ROBERT WHITE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

Amici curiae, former United States diplomats and State Department officials, submit this brief in support of the proposition that our national interest in amicable relations among nations does not support sovereign immunity for former officials of foreign governments from suit in United States courts for alleged torture and extrajudicial executions.[1]

Amici are the following former United States diplomats and State Department officials:

Morton I. Abramowitz was Assistant Secretary of State for Intelligence and Research from 1986 to 1989. Among other positions in his government career, he was also Ambassador to Thailand from 1978 to 1981, Ambassador to Turkey from 1989 to 1991 and Ambassador to the Mutual and Balanced Force Reduction Negotiations in Vienna from 1983 to 1984.

J. Brian Atwood served as Under Secretary of State for Management in 1993 and as Administrator of the United States Agency for International Development from 1993 to 1999.

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[1] The parties have consented in writing to the filing of this brief. Counsel for *amici* authored this brief in its entirety. No counsel for a party authored this brief in whole or in part, and no counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the Center for Civil and Human Rights of Notre Dame Law School made a monetary contribution to the preparation or submission of this brief.

Harriet C. Babbitt served as Ambassador and Permanent Representative of the United States to the Organization of American States from 1993 to 1997, and as Deputy Administrator of the United States Agency for International Development from 1997 to 2001.

Harry G. Barnes, Jr., served as Ambassador to Romania from 1974 to 1977, Director General of the Foreign Service and Director of Personnel in the Department of State from 1977 to 1981, Ambassador to India from 1981 to 1985 and Ambassador to Chile from 1985 to 1988.

J.D. Bindenagel was Ambassador and Special Envoy for Holocaust issues from 1999 to 2002 and U.S. Special Negotiator for Conflict Diamonds from 2002 to 2003. During his 28-year career as a Foreign Service Officer he served in Asia and in Europe.

James Bishop was Deputy Assistant Secretary of State for Africa from 1981 to 1987 and Principal Deputy Assistant Secretary of State for Human Rights and Humanitarian Affairs from 1991 to 1993. During his 33 years as a U.S. Foreign Service Officer, he also served as Ambassador to Niger from 1979 to 1981, Ambassador to Liberia from 1987 to 1990 and Ambassador to Somalia from 1990 to 1991.

James L. Bullock is Minister Counselor, retired. His final post was as Minister Counselor for Public Affairs at the U.S. Embassy in Paris from 2006 to 2009. Among other posts in his 30-year Foreign Service career, he served in Embassy section head

assignments in several Arab world capitals and as press attaché at the U.S. Embassy in Moscow.

A. Peter Burleigh served as Ambassador and Coordinator for Counter-terrorism from 1991 to 1992, Ambassador to Sri Lanka and the Maldives from 1995 to 1997, and Ambassador and Deputy Permanent Representative to the United Nations from 1997 to 1999.

Hodding Carter III was Assistant Secretary of State for Public Affairs from 1977 to 1980.

Goodwin Cooke was Ambassador to the Central African Republic from 1978 to 1980. His career as a Foreign Service Officer included posts in Africa, Asia, Canada and Europe.

Patricia Derian was Assistant Secretary of State for Human Rights and Humanitarian Affairs from 1977 to 1981.

Robert S. Gelbard was Assistant Secretary of State for International Narcotics and Law Enforcement Affairs from 1993 to 1997. Among other senior diplomatic posts, he served as Ambassador to Bolivia from 1988 to 1991, Ambassador to Indonesia from 1999 to 2001, and as the President's Special Representative to the Balkans from 1997 to 1999.

William C. Harrop served as Ambassador to Guinea from 1975 to 1977, Deputy Assistant Secretary of State for Africa from 1977 to 1980, Ambassador to Kenya from 1980 to 1983, Inspector General of the Department of State and the Foreign Service from

1983 to 1987, Ambassador to Zaire from 1987 to 1991, and Ambassador to Israel from 1991 to 1993.

Samuel F. Hart served as Ambassador to Ecuador from 1982 to 1985.

John L. Hirsch served as Ambassador to Sierra Leone from 1995 to 1998.

Allen Holmes served as Ambassador to Portugal from 1982 to 1985, Assistant Secretary of State for Political-Military Affairs from 1985 to 1989, and Assistant Secretary of Defense for Special Operations and Low Intensity Conflict from 1993 to 1999.

Princeton N. Lyman served 37 years with the U.S. Government. His positions included Deputy Assistant Secretary of State for African Affairs from 1981 to 1986, Ambassador to Nigeria from 1986 to 1989, Ambassador to South Africa from 1992 to 1995, and Assistant Secretary of State for International Organization Affairs from 1997 to 1998.

Marilyn McAfee was a career foreign service officer from 1968 to 1998. She served as Ambassador to Guatemala from 1993 to 1996. Other postings included Nicaragua, Iran, Washington, Costa Rica, Venezuela, Chile and Bolivia, where she was Deputy Chief of Mission from 1989 to 1992. In 1997 she was designated Assistant Inspector General for Inspections, and subsequently Acting Deputy Inspector General of the Department of State.

James C. O'Brien was Principal Deputy Director of the Office of Policy Planning in the Department of State from 1998 to 2000, and Special Presidential

Envoy to the Balkans from 2000 to 2001. He served in the Department of State from 1989 to 2001.

Thomas R. Pickering was Under Secretary of State for Political Affairs from 1997 to 2001. He also served as Ambassador to Jordan from 1974 to 1978, Assistant Secretary of State for Oceans, Environment and Science from 1978 to 1981, Ambassador to Nigeria from 1981 to 1983, Ambassador to El Salvador from 1983 to 1985, Ambassador to Israel from 1985 to 1988, Ambassador and Representative to the United Nations from 1989 to 1992, Ambassador to India from 1992 to 1993, and Ambassador to the Russian Federation from 1993 to 1996.

Laurence E. Pope served as Associate Coordinator for Counter-terrorism from 1991 to 1993, Ambassador to Chad from 1993 to 1996, and Political Advisor to the Commander in Chief, U.S. Central Command, from 1997 to 2000.

David J. Scheffer was Ambassador at Large for War Crimes Issues from 1997 to 2001 and was Senior Adviser and Counsel to the U.S. Permanent Representative to the United Nations, as well as a member of the Deputies Committee of the National Security Council, from 1993 to 1997.

John Shattuck was Assistant Secretary of State for Democracy, Human Rights and Labor from 1993 to 1998, and Ambassador to the Czech Republic from 1998 to 2000.

Paul K. Stahnke is Minister Counselor, retired. Among other posts, he was Counselor of Mission at the United States Mission to the Organization for Economic Cooperation and Development in Paris from 1978 to 1982, and Permanent Representative to

the United Nations Economic and Social Council for Asia and the Pacific from 1982 to 1988. He was in the U.S. Embassy in Mogadishu, Somalia, at the time the Barre regime took power.

Alexander F. Watson served as Ambassador to Peru from 1986 to 1989, Ambassador and Deputy Permanent Representative to the United Nations from 1989 to 1993, and Assistant Secretary of State for Western Hemisphere Affairs from 1993 to 1996.

Robert White served as Ambassador to Paraguay in 1977 to 1980 and Ambassador to El Salvador in 1980 to 1981. Among other posts during his 25-year career as a Foreign Service Officer, he also served as Latin American Director of the Peace Corps and as Deputy Permanent Representative to the Organization of American States.

As former diplomats and State Department officials with collectively broad and diverse experience, *amici* are uniquely suited to comment on whether our national foreign policy interests would be served by extending sovereign immunity to former foreign officials sued in our courts for alleged torture and extrajudicial execution. *Amici* believe that such a blanket extension is not only unwarranted, but would conflict with our national interests. In view of long-standing American policy recognizing our national interest in holding human rights violators accountable, sheltering former foreign officials behind an impenetrable wall of sovereign immunity is inappropriate in such cases.

SUMMARY OF ARGUMENT

Amici curiae are former American diplomats and State Department officials. *Amici* submit this brief in support of the proposition that our national interest in amicable relations among nations does not support a blanket extension of sovereign immunity to former foreign officials in the narrow and discrete context of their being sued in United States courts for alleged torture and extrajudicial executions.[2]

We understand that the Court of Appeals interpreted the Foreign Sovereign Immunities Act not to confer sovereign immunity on individual foreign officials and former officials.[3] We express no view on that broad statutory holding. We address only a narrow question within our professional expertise and squarely presented by the facts of this case: whether extending sovereign immunity to former foreign officials sued for alleged torture and extrajudicial executions is in our national interest.[4] As the Court of Appeals recognized, sovereign immunity is a matter of comity among nations. Its purpose is to protect "'our national interest' and the preservation

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[2] This *amicus* brief expresses no view on sovereign immunity for former foreign officials outside the context of cases of torture and extrajudicial executions.

[3] *Yousuf v. Samantar*, 552 F.3d 371, 373, 381, 383 (4th Cir.), *cert. granted*, 130 S. Ct. 49 (2009) (hereinafter "*Yousuf*").

[4] We understand that respondents in this case focus on the issue of sovereign immunity for former foreign officials.

of amicable international relations" (majority opinion).[5] By nature sovereign immunity is "inextricably bound up with the executive branch's conduct of foreign affairs" (concurring opinion).[6] These are matters within our ken. And our collective experience teaches that amicable international relations do not require that former foreign officials be given blanket immunity from suit in our courts for alleged torture and extrajudicial executions.

We recognize that there may be occasions where the executive branch believes that it is not in the national interest for a particular lawsuit to proceed. In such cases, courts have ample tools, such as the political question and act of state doctrines, among others, to dismiss lawsuits on a case by case basis without granting immunity to all former foreign officials accused of torture and extrajudicial executions. The national interest can thus be protected without a blanket extension of the blunt and over-inclusive tool of sovereign immunity.

On the other hand, there are occasions where the national interest is consistent with the very purpose of a lawsuit. If the facts alleged here are true – a matter on which we express no view – the present suit may be such a case. Plaintiffs allege that a former senior official of a brutal and undemocratic

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[5] *Yousuf*, 552 F.3d at 383 (citations omitted).

[6] *Id.* at 384 (Duncan, J., concurring).

regime was responsible for their torture and for extrajudicial executions of their family members.[7] That regime is no longer in power, that nation (Somalia) is widely viewed as a paradigm of a failed state, its courts are dysfunctional, and the former official now resides in our country.[8] In such circumstances, there is good reason to believe that our fundamental foreign policy commitment to human rights and the rule of law – cornerstones of American foreign policy for decades – may be vindicated by allowing our courts to hear the suit.

Counter arguments have been raised: We are urged to respect foreign courts and not to judge former foreign officials by American laws. But neither contention applies here, where the foreign courts are those of a failed State, and where the suit is based not on American but on international law. We are also told that to deny sovereign immunity to former foreign officials, even in cases of torture, would make the United States unique. In fact, as illustrated by the British House of Lords' judgment denying sovereign immunity to General Pinochet in 1999,[9] we would hardly be the first to deny sovereign immunity in a case of alleged torture.

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[7] *Id.* at 374.

[8] *Id.* (indicating that Mr. Samantar now resides in United States).

[9] *R v. Bow Street Magistrate, ex parte Pinochet*, [2000] 1 AC 147, [1999] 2 All ER 97, [1999] 2 WLR 827.

Finally, we are admonished that to deny sovereign immunity to former foreign officials in our courts would lead to denial of immunity to former American officials in foreign courts. But our former officials are already significantly protected from foreign suits by the act of state and other judicial doctrines, as well as by American diplomacy. Considerations of reciprocity would further limit their exposure in the event this Court denies sovereign immunity to former foreign officials specifically in cases of alleged torture and extrajudicial execution.

For these reasons, we respectfully suggest that the very purpose of sovereign immunity – comity among nations – is consistent with denying sovereign immunity to former foreign officials sued in our courts for torture and extrajudicial executions. Comity among nations does not imply a utopian state of international harmony, but rather calls on each nation to "respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement."[10] In view of international law prohibitions of torture and extrajudicial executions, as well as longstanding American policy recognizing our national interest in holding human rights violators

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[10] *Sosa v. Alvarez Machain*, 542 U.S. 692, 761 (2004) (Breyer, J., concurring) (stressing that it is important for courts to ask "whether the exercise of jurisdiction under the AT[CA] is consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement").

accountable, sheltering former foreign officials behind an impenetrable wall of sovereign immunity is inappropriate in such cases.

ARGUMENT

I. COMITY AMONG NATIONS DOES NOT REQUIRE THAT FORMER FOREIGN OFFICIALS BE SHIELDED BY SOVEREIGN IMMUNITY FROM SUIT FOR ALLEGED TORTURE AND EXTRAJUDICIAL EXECUTIONS.

Citing precedent from this Court,[11] the Court of Appeals recognized that the purpose of sovereign immunity is to protect the national interest in preserving amicable international relations.[12] In our judgment, international harmony does not require extending sovereign immunity to former foreign officials sued for torture and extrajudicial executions, for two reasons.

First, where a suit against a former foreign official is not in our national interest, courts already have adequate tools – short of sovereign immunity – to dismiss such a suit. Second, unlike those flexible

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[11] *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983); *Ex parte Republic of Peru*, 318 U.S. 578, 589 (1943); *Republic of Mexico v. Hoffman*, 324 U.S. 30, 36 (1945); *Republic of Austria v. Altmann*, 541 U.S. 677, 696 (2004).

[12] *Yousuf*, 552 F.3d at 382-83.

and adaptable tools, a blanket extension of sovereign immunity to former officials would mean that foreign torturers could *never* be held to account by our courts – even where there are good reasons, consistent with the national interest, to bring them before American courts. Because of our national interest in holding human rights violators accountable, immunizing all foreign officials sued for torture and extrajudicial executions is particularly unwise.

A. Courts Have Adequate Tools to Dismiss Suits When They Are Contrary to the National Interest.

There are occasions when allowing a particular suit to proceed is against our national interest. Yet our courts do not need the additional tool of a blanket, inflexible extension of sovereign immunity to all former foreign officials sued for torture. Encouraged by this Court,[13] on a case by case basis, courts often dismiss suits or claims deemed to be contrary to the national interest. In doing so courts rely on doctrines of nonjusticiable political questions,[14] act of state,[15]

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[13] *Sosa v. Alvarez Machain*, 542 U.S. at 733 n.21 (2004) (endorsing "case-specific deference to the political branches").

[14] *E.g., Alperin v. Vatican Bank*, 410 F.3d 532, 538 (9th Cir. 2005), *cert. denied*, 546 U.S. 1137 (2006) (dismissing human rights and international law claims under political question doctrine).

[15] *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964).

separation of powers,[16] and international comity.[17] Normally the courts rule on such matters at the request of the defense, and often after requesting, receiving, and taking into account the views of the Executive Branch as articulated by the State Department.

The virtue of all these tools is that they are flexible and case-specific: they can be applied and tailored to meet the specific national interest at stake in each case. Unlike broad assertions of sovereign immunity, they are not extended across-the-board to an entire class of beneficiaries – former foreign officials – in cases of alleged torture and extrajudicial execution. The national interest can be protected without extending the over-inclusive shield of sovereign immunity that far.

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[16] *Sosa v. Alvarez Machain*, 542 U.S. at 733 n.21 (2004) (where State Department opposes suit on foreign policy grounds, "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy"); *Doe v. Exxon Mobil*, 393 F. Supp. 2d 20, 21, 23-24 (D.D.C. 2005) (dismissing federal claims based on separation of powers and foreign policy impacts).

[17] In *Sosa v. Alvarez Machain*, Justice Breyer's concurring opinion stressed that it is important for courts to ask "whether the exercise of jurisdiction under the AT[CA] is consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement." 542 U.S. at 761.

B. Suits Against Former Foreign Officials For Torture and Extrajudicial Execution May Be Consistent with the National Interest and Should Not Be Barred Categorically by Sovereign Immunity.

The present suit is brought under the Alien Tort Statute and the Torture Victim Protection Act.[18] Suits under the Alien Tort Statute often allege torture and extrajudicial executions[19] (as in the present case).[20] By statutory definition, suits under the Torture Victim Protection Act are limited to cases of alleged torture and extrajudicial executions.[21]

The purpose of such suits is consistent with longstanding, central aims of United States foreign policy – to uphold human rights and the rule of law. Our national foreign policy commitment to human rights and the rule of law has been codified for

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[18] *Yousuf*, 552 F.3d at 373, citing Alien Tort Statute, 28 U.S.C. § 1350, and Torture Victim Protection Act of 1991, see Pub. L. 102-256, 106 Stat. 73 (1992) (reproduced at 28 U.S.C. § 1350 note).

[19] *E.g.*, *Cabello Barrueto v. Fernandez Larios*, 205 F. Supp. 2d 1325 (S.D. Fla. 2002), *aff'd*, 402 F.3d 1148 (11th Cir. 2005) (extrajudicial killing, torture, crimes against humanity, and cruel, inhuman or degrading punishment or treatment); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (summary execution, torture, disappearance, cruel, inhuman or degrading treatment).

[20] *Yousuf*, 552 F.3d at 373-74.

[21] Torture Victim Protection Act, §§ 2(a) and 3(a) and (b).

decades in legislation,[22] and reiterated by Administrations of both parties.[23] Most recently in December 2009 Secretary of State Hillary Rodham Clinton reaffirmed that our "commitment to human rights starts with universal standards and with holding everyone accountable to those standards."[24] She added:

> By holding ourselves accountable, we reinforce our moral authority to demand that all governments adhere to obligations under international law; among them, not to torture, arbitrarily detain and persecute dissenters, or engage in political killings. Our government and the international community must . . . hold violators to account.[25]

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[22] Under United States law, "a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally protected human rights by all countries." 22 U.S.C. § 2304(a)(1).

[23] Two decades ago, for example, President George Bush proclaimed, "In this new era, in which countries throughout the world are turning to democratic institutions and the rule of law, we must maintain and strengthen our commitment to ensuring that human rights are respected everywhere." *Statement on Signing the Torture Victim Protection Act of 1991*, 28 Weekly Comp. Pres. Doc. 465 (March 12, 1992).

[24] *Remarks on the Human Rights Agenda for the 21st Century*, Georgetown University, December 14, 2009, accessible at http://www.state.gov/secretary/rm/2009a/12/133534.htm, last visited Jan. 6, 2010.

[25] *Id.*

This commitment to accountability for torturers not only reflects our basic values, but also prudently defends our interests. Foreign governments that commit gross violations of human rights breed political instability and commercial insecurity. Especially in the current, worldwide battle for hearts and minds, our visible national commitment to human rights and accountability is among our most important foreign policy assets.

Reflecting this commitment, on a case by case basis, past Administrations have expressly refrained from objecting to suits against alleged torturers under the Alien Tort Statute or Torture Victim Protection Act, and have even affirmatively supported such suits. For example, in 1980 the State Department submitted a brief in support of a suit under the Alien Tort Statute against a former Paraguayan official accused of torture and extrajudicial execution,[26] and in 1997 a State Department letter advised a district court that "at this time adjudication of the claims based on allegations of torture and slavery would not prejudice or impede the conduct of U.S. foreign relations with the current government of Burma."[27]

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[26] *Filartiga v. Pena Irala*, 630 F.2d 876 (2d Cir. 1980), *see Memorandum for the United States as* Amicus Curiae, Filartiga v. Pena-Irala, *reprinted at* 19 I.L.M. 585, 601-06 (1980).

[27] *Statement of Interest of the United States*, National Coalition Gov't of Burma v. Unocal, Inc., 176 F.R.D. at 362 (C.D. Cal. 1997) (No. 96-6112), 1997 U.S. Dist. LEXIS 20975.

If the facts alleged here are true – a matter on which we express no view – the present case may well be an example of a suit that affirmatively promotes our national interest. Plaintiffs allege that a former senior official of a brutal and undemocratic regime authorized their torture and extrajudicial executions of their family members.[28] That regime is no longer in power,[29] that nation (Somalia) is widely viewed as a paradigm of a failed state,[30] its courts are dysfunctional,[31] and the former official now resides in our country.[32]

Permitting a suit against an alleged torturer to go forward in these circumstances could thus vindicate our national interest in accountability for human rights violators. But if sovereign immunity were automatically extended to all former foreign officials, such as the defendant in this case (a former Minister of Defense and Prime Minister of a defunct regime), in the context of suits for torture and extrajudicial executions, accountability would be thwarted not only in this case, but in every such case.

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[28] *Yousuf*, 552 F.3d at 374.

[29] *Id.*

[30] *E.g.*, International Crisis Group, *Somalia: Countering Terrorism in a Failed State*, Africa Report No. 45, 23 May 2002, accessible at http://www.crisisgroup.org/home/index.cfm?id=1690&l=1, last visited Jan. 6, 2010; *see also* State Department Country Report for 2008, note 35 *infra* ("absence of functioning institutions").

[31] *See* note 36 *infra*.

[32] *Yousuf*, 552 F.3d at 374.

Such a rigid rule would not serve our national interest.

II. THE RATIONALES FOR SOVEREIGN IMMUNITY DO NOT JUSTIFY ITS EXTENSION TO FORMER FOREIGN OFFICIALS SUED FOR TORTURE AND EXTRAJUDICIAL EXECUTIONS.

At least four rationales for sovereign immunity have been suggested by other *amici* in this case.[33] But none applies in this case or cases like it.

First, to the extent that sovereign immunity from suit rests on "mutual respect for the adequacy of the foreign State's legal system,"[34] no respect is due to the foreign legal system in this case. The State Department's most recent Country Report on Human Rights Practices notes that Somalia is afflicted by a general "absence of functioning institutions."[35] As for Somalia's legal system, assessed as of the date of the Report (February 2009), "Judicial systems were not well established, were not based upon codified law,

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[33] *Brief of* Amici Curiae *Former Attorneys General of the United States in Support of the Petitioner*, in the instant case (hereafter "Amici A.G.").

[34] Amici A.G. at 5.

[35] U.S. Dept. of State, Bureau of Democracy, Human Rights and Labor, 2008 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, *Somalia*, Feb. 25, 2009, 3d paragraph, accessible at http://www.state.gov/g/drl/rls/hrrpt/2008/af/119024.htm (last visited Jan. 6, 2010).

did not function, or simply did not exist in most areas of the country."[36]

Second, it is argued that "a foreign sovereign's acts should not be tested in United States courts, according to United States legal principles."[37] That rationale is singularly inapplicable to cases, such as the present, brought under the Alien Tort Statute and Torture Victim Protection Act. The Alien Tort Statute confers jurisdiction on United States courts,[38] solely to hear suits for violations "of the law of nations or a treaty of the United States."[39] The applicable "legal principles" in such suits are solely those of international law. Likewise the Torture Victim Protection Act, although not merely jurisdictional,[40] makes international law prohibitions of torture and extrajudicial executions enforceable in our courts.

Third, it is argued that denying sovereign immunity to former foreign officials would place the United States out of step with foreign jurisdictions,[41] where "[f]oreign sovereign immunity for officials discharging their governmental duties historically

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[36] *Id.*, § 1.d.

[37] Amici A.G. at 5 (citing *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 763 (1972), in turn citing *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897)).

[38] *Yousuf*, 552 F.3d at 374-75.

[39] 28 U.S.C. § 1350.

[40] *Yousuf*, 552 F.3d at 375.

[41] Amici A.G. at 9-13.

had been absolute."[42] That may have been true historically. Nowadays, however, granting absolute sovereign immunity to former foreign officials in cases of torture would place us out of step with our closest allies.

A decade ago, for example, the British House of Lords denied the claim of General Augusto Pinochet, as the former head of state of Chile, to sovereign immunity from prosecution for torture.[43] The Law Lords relied on the Convention Against Torture.[44] That treaty applies only to torture committed by or with the acquiescence of public officials.[45] The Lords reasoned that the treaty could not simultaneously have been intended to strengthen legal accountability for former foreign officials accused of torture, while also cloaking them all in sovereign immunity:

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[42] *Id.* at 15.

[43] *R v. Bow Street Magistrate, ex parte Pinochet*, [2000] 1 AC 147, [1999] 2 All ER 97, [1999] 2 WLR 827. The Law Lords also stated that, if General Pinochet remained the current head of state of Chile, he would be entitled to sovereign immunity. *E.g.*, Judgment of Lord Browne-Wilkinson. But at the time of the judgment the General remained a foreign official of Chile in the sense that he was still a Senator.

[44] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, *entry into force*, June 26, 1987, G.A. Res. 39/46, Annex, U.N. GAOR, Supp. No. 51, U.N. Doc. A/39/51 (1984).

[45] Article 1 defines torture under the Convention to include only torture "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

> Under the convention the international crime of torture can only be committed by an official or someone in an official capacity. They would all be entitled to immunity. It would follow that there can be no case outside Chile in which a successful prosecution for torture can be brought unless the state of Chile is prepared to waive its right to its officials' immunity. Therefore the whole elaborate structure of universal jurisdiction over torture committed by officials is rendered abortive and one of the main objectives of the Torture Convention – to provide a system under which there is no safe haven for torturers – will have been frustrated. In my judgment all these factors together demonstrate that the notion of continued immunity for ex-heads of state is inconsistent with the provisions of the Torture Convention.[46]

If this Court were to allow former foreign officials sovereign immunity from suit for torture, the result would thus place the United States (also a party, as is Somalia, to the Convention Against Torture[47]) out of step with the sound reasoning of the Law Lords in *Pinochet*. It would similarly cripple the capacity of

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[46] *R v. Bow Street Magistrate*, note 43 *supra* (Browne-Wilkinson, J.).

[47] The United States became a State Party to the Convention Against Torture on October 21, 1994, and Somalia became a State Party on January 24, 1990. See ratification table at http://treaties.un.org (last visited Jan. 6, 2010).

the Torture Victim Protection Act to achieve its legislative purpose. Like the Convention, the Act applies to torture and extrajudicial executions *only* when committed by individuals acting "under actual or apparent authority, or color of law, of any foreign nation . . . "[48] If all former foreign officials were shielded by sovereign immunity, practically no one could be sued under the Act.

Not only would such expansive immunity frustrate the purposes of both the Convention and the Act, it would make the United States stand out as an anachronism in today's world. In our judgment, such an extension of sovereign immunity would undermine our nation's vital foreign policy claim to stand for human rights and accountability.

Finally, concerns have been raised that if former foreign officials do not enjoy sovereign immunity in our courts, then neither do we in their courts.[49] But where charges of torture and extrajudicial execution are well-founded, former American officials should not be immunized from suit abroad. On the other hand, where such charges are dubious or unfounded, former American officials already have significant protection in foreign courts, even without an across-the-board shield of sovereign immunity. While in office, of course, American diplomats are protected by

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[48] Pub. L. 102-256, 106 Stat. 73, § 2(a).

[49] Amici A.G. at 9-13.

diplomatic immunity.[50] Former officials are protected under international law, where appropriate, by the act of state doctrine.[51] And as a practical matter, they are protected where appropriate by American diplomacy. Most strikingly, when laws in Belgium and Spain authorized their courts to exercise jurisdiction over former American officials, beyond that required by international treaties, American diplomacy succeeded in securing the repeal of the overreaching aspects.[52]

Finally, in the event this Court denies sovereign immunity to former foreign officials in the narrow and discrete context of cases of alleged torture and extrajudicial executions, considerations of reciprocity would provide a further diplomatic argument that

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[50] Vienna Convention on Diplomatic Relations, 18 April 1961, *entry into force*, 24 April 1964, 500 U.N.T.S. 95, art. 31.1 (a diplomat is immune from criminal jurisdiction, and from civil and administrative jurisdiction except in cases involving private real estate, private inheritance, or professional or commercial activities "outside his official functions").

[51] *See, e.g.*, discussion of the act of state doctrine in Britain in *Kuwait Airways Corp. v. Iraqi Airways Co.*, [2002] UKHL 19, pars. 138-40.

[52] J. Yoldi, *Las Cortes recortan la jurisdicción universal ["Congress restricts universal jurisdiction"]*, EL PAIS, Oct. 16, 2009 (Spanish Congress restricts universal jurisdiction after government decision, following human rights complaints against the United States over Guantanamo and CIA flights); L. Hurst, *Belgium reins in war crime law; U.S. threats finally sink 'universal jurisdiction' suits: Anti-war activists used court to sue American leaders*, THE TORONTO STAR, June 29, 2003, p. F04.

foreign courts should similarly respect the immunity of our former officials.

In short, former American officials are significantly protected from suit abroad without the categorical extension of an inflexible shield of sovereign immunity for former foreign officials sued in our courts for alleged torture and extrajudicial executions.

CONCLUSION

For all these reasons, *amici* respectfully suggest to the Court that the national interest does not require and indeed would be impaired by extending sovereign immunity to shield former foreign officials from all suits in our courts for alleged torture and extrajudicial executions.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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MOHAMED ALI SAMANTAR,
Petitioner,

v.

BASHE ABDI YOUSUF, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE KINGDOM OF SAUDI ARABIA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the Kingdom of Saudi Arabia respectfully submits this brief in order to assist the Court in understanding the critical importance of sovereign immunity for foreign states and their officials. As relevant here, it is the position of Saudi Arabia that the presumptive immunity of foreign states extends to individual officials sued for official-capacity acts, whether that immunity is grounded in the Foreign Sovereign Immunities Act of 1976 ("FSIA"), the common law, or both. Because the official-capacity acts of state officials are the acts of the state itself, the sovereign immunity of individual officials sued in their official capacity must be understood to be at least coextensive with that of the state. Otherwise, plaintiffs could circumvent state sovereign immunity simply by suing current (and former) state officials, substantially reducing the importance of the doctrine and threatening international comity.

Saudi Arabia has unique experience with litigating the subject of sovereign immunity and a strong interest in the issues raised in this case. More than six years ago, numerous lawsuits were filed on behalf of individuals and businesses injured in the terrorist attacks of September 11, 2001, as well as the victims' families. These lawsuits accused more than 200 individuals, non-profits, financial institutions, foreign

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that no counsel for a party authored this brief in whole or in part and that none of the parties or their counsel, nor any other person or entity other than *amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amicus* also represents that all parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

officials, and sovereign states and entities of complicity in these attacks. Among those named as defendants were Saudi Arabia, agencies and instrumentalities of Saudi Arabia, and high-ranking officials of Saudi Arabia sued for official-capacity acts. The plaintiffs alleged that Saudi Arabia and its officials provided financial and other material support to al Qaeda, knowing and intending that al Qaeda would use this support to attack the United States and to murder innocent civilians.

Those allegations were as reprehensible as they were fabricated. Saudi Arabia has been and is a pivotal ally of the United States. Its own homeland has been targeted by the same al Qaeda extremists that organized and carried out the terrorist attacks of September 11. Indeed, the bipartisan National Commission on Terrorist Attacks Upon the United States concluded, after an exhaustive study of the causes of the September 11 attacks, that "Saudi Arabia has long been considered the primary source of al Qaeda funding, but we have found no evidence that the Saudi government as an institution or senior Saudi officials individually funded the organization." *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States* 171 (July 2004).

The Second Circuit has now affirmed a district court's dismissal of all claims against Saudi Arabia and several of its high-ranking officials under the FSIA. Consistent with the recommendation of the Solicitor General, this Court declined review of that decision, and it is now final. But, because claims against other Saudi officials and agencies and instrumentalities remain pending, and in light of the possibility that litigation in U.S. courts will be used

as a means to harass or embarrass Saudi Arabia and its officials in other matters (even as the political branches of the United States work toward even stronger diplomatic and economic ties with Saudi Arabia), Saudi Arabia retains a strong interest in the issues of sovereign immunity raised here.

SUMMARY OF ARGUMENT

It is a longstanding principle of domestic and international law that foreign nations are immune from suit in foreign judicial tribunals. The dual holdings of the Fourth Circuit below – that foreign sovereign immunity under the FSIA does not extend to official-capacity suits against foreign officials and, alternatively, that any such immunity would be time-bound and limited to the tenure of the official in office – conflict with the purposes and history of foreign sovereign immunity and the text, structure, history, and purposes of the FSIA itself. This brief makes three points in support of reversal of the Fourth Circuit's decision.

First, foreign sovereign immunity is a crucial component of U.S. law and international relations and, to fulfill the purposes of such immunity, foreign sovereign immunity must be extended to the official-capacity acts of individual officials. Sovereign immunity serves as a gesture of comity among nations, designed to protect the dignity of foreign states; it embodies the recognition that disputes over the official conduct of foreign states are best resolved through government-to-government contact rather than private litigation; and, by limiting the instances in which U.S. courts will sit in judgment of the legality of the official conduct of foreign states, sovereign immunity advances the amicable relations among nations.

In view of those purposes of foreign sovereign immunity, it would be surpassing strange to construe such immunity as applicable to a foreign state, but not to foreign officials sued for carrying out the acts of the foreign state. As this Court has long recognized in an analogous context, a state can act only through its officials and agents. For that reason, allowing private parties to sue foreign officials for official-capacity acts would conflict with the core purposes of immunity. Such a limited conception of foreign sovereign immunity would render meaningless the gesture of comity underlying such immunity; it would distract from efforts to have grievances regarding official conduct resolved through government-to-government channels; and it would subject the official conduct of foreign states to judgment in U.S. courts. It is therefore not surprising that robust immunity for foreign officials has long been recognized under the common law as well as the FSIA.

Second, regardless of whether the FSIA is the *exclusive* source of foreign sovereign immunity for official-capacity acts, the text, structure, history, and purposes of the statute establish that it does apply to official-capacity suits and that such immunity does not dissipate when an individual official leaves office. The Fourth Circuit's contrary conclusions are wrong.

Textually, a suit against an individual official for official-capacity acts is a suit against a "foreign state" within the meaning of the FSIA. The FSIA's definition of "foreign state" as "includ[ing]" agencies or instrumentalities in no way means that *only* agencies and instrumentalities constitute the foreign state. Such a reading of the FSIA would be flatly inconsistent with the text, because the word "includes" necessarily means that something other than the listed

entities can constitute the foreign state. And it would lead to a bizarre, bifurcated immunity regime in which the caption of a complaint (i.e., whether plaintiffs name the foreign state or officials of the foreign state) and not the conduct alleged in the complaint would determine whether the FSIA or the common law applies. Congress – in a statute designed to free immunity determinations from political and diplomatic pressure – cannot have intended such a result.

Nor is the Fourth Circuit correct in its counter-intuitive conclusion that any individual immunity under the FSIA is time-limited. The common law – which the FSIA codified – drew no distinction between former and current officials. And such a distinction would make no sense: allowing a plaintiff to sue for official-capacity conduct when an official leaves office would undermine comity and require U.S. courts to pass on the legality of the official acts of foreign states. This Court's decision in *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003) – which turned on the present tense of part of the definition of "agency or instrumentality" – does not compel a different result because a suit against an individual official is against the "foreign state" itself.

Third, any conclusion by this Court that the FSIA does not apply to individuals sued for official-capacity acts or that it does not apply to former officials could have deleterious consequences, inviting years of litigation against foreign officials to test the contours of common-law immunity and leading to frequent calls for the State Department to weigh in on immunity questions involving sensitive foreign policy matters. Because that outcome would countermand the core purposes of foreign sovereign immu-

nity, if the Court concludes that the common law is the exclusive source of immunity, it should reaffirm three basic principles to guide lower court decisions: common-law immunity applies to officials sued for all official-capacity acts; common-law immunity is absolute, and not subject to any exception; and common-law immunity does not dissipate when an official leaves or retires from office.

ARGUMENT

I. SOVEREIGN IMMUNITY REMAINS CRITICALLY IMPORTANT TO THE AMICABLE RELATIONS AMONG NATIONS AND SUCH IMMUNITY MUST EXTEND TO THE OFFICIAL-CAPACITY ACTS OF INDIVIDUALS TO FULFILL ITS PURPOSES

A. This Court Has Long Recognized the Important Purposes Served by Foreign Sovereign Immunity

"The immunity of a state from the jurisdiction of the courts of another state is an undisputed principle of customary international law." *Restatement (Third) of the Foreign Relations Law of the United States* 390 (1987). Since the early 1800s, "the United States generally granted foreign sovereigns complete immunity from suit in the courts of this country." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). That venerable practice – which dates to shortly after the birth of the Republic, *see The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812) (Marshall, C.J.) – serves several important ends.

First, recognition of the immunity of foreign nations from suit in U.S. courts is "a gesture of comity between the United States and other sovereigns." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 479

(2003); *see also Republic of Austria v. Altmann*, 541 U.S. 677, 688 (2004) ("Chief Justice Marshall went on to explain . . . that as a matter of comity, members of the international community had implicitly agreed to waive the exercise of jurisdiction over other sovereigns in certain classes of cases, such as those involving foreign ministers or the person of the sovereign."). This gesture of comity is not an end in itself, but serves to safeguard the dignity of foreign nations, *see National City Bank of New York v. Republic of China*, 348 U.S. 356, 362 (1955) (sovereign immunity "deriv[es] from standards of public morality, fair dealing, reciprocal self-interest, and respect for the power and dignity of the foreign sovereign") (internal quotation marks omitted), and to promote "the maintenance of friendly relations," *Restatement (Third) of the Foreign Relations Law of the United States* at 391.

Second, granting immunity to foreign nations ensures that disputes over public, governmental acts will be resolved through government-to-government channels. As this Court has explained in a related context, "[r]edress of grievances by reason of . . . acts" of sovereign states "must be obtained through the means open to be availed of by sovereign powers as between themselves." *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897); *see Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 422-23 (1964) ("[T]he usual method for an individual to seek relief is to exhaust local remedies and then repair to the executive authorities of his own state to persuade them to champion his claim in diplomacy or before an international tribunal."). Put differently, the doctrine of sovereign immunity reflects that government-to-government relations and diplomacy, not private

litigation in foreign judicial tribunals, are the appropriate tools for seeking redress for the official conduct of foreign states. *Cf. The Schooner Exchange*, 11 U.S. at 146 (noting that suits against foreign nations typically raise "questions of policy [rather] than of law" and thus are "for diplomatic, rather than legal discussion").

Third, absent sovereign immunity, U.S. courts regularly would be called upon to sit in judgment of the acts of foreign nations – a practice this Court has recognized would "vex the peace of nations." *Sabbatino*, 376 U.S. at 417-18 ("To permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations.") (internal quotation marks omitted); *see id.* at 423 ("The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere."); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303-04 (1918) ("The principle that the conduct of one independent government cannot be successfully questioned in the courts of another . . . rests at last upon the highest considerations of international comity and expediency"); *see also Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 703-04 (1976) (a concern with avoiding U.S. courts "pass[ing] on the legality of . . . governmental acts" underlies the doctrine of sovereign immunity).

Those historical foundations for the doctrine of sovereign immunity remain apposite. The United

States prides itself on the broad access it provides to its state and federal courts. But what may be an appropriate point of civic pride in one context can be a vexing obstacle to diplomatic relations in another. Particularly in light of the ease with which litigants can access state and federal courts, a robust understanding of sovereign immunity remains critically necessary to respect the comity of other nations, to maintain the primacy of the Executive Branch in the conduct of diplomatic relations, and to prevent state and federal courts from "vex[ing] the peace" of nations by sitting in judgment of the official acts of foreign states.

B. Any Sensible Concept of Sovereign Immunity Must Encompass the Official-Capacity Acts of Individuals

As the federal courts have long held, the same considerations that support affording sovereign immunity to foreign states require such immunity to be extended to foreign officials acting in their official capacity. A foreign state can act only through its individual officials. *See In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71, 84 (2d Cir. 2008) (noting the "evident principle that the [foreign] state cannot act except through individuals"), *cert. denied*, 129 S. Ct. 2859 (2009); *cf. Tennessee v. Davis*, 100 U.S. 257, 263 (1880) (state "can act only through its officers and agents"). It would therefore countermand the purposes of sovereign immunity to refuse to extend the state's immunity to those officials. Such a blinkered concept of sovereign immunity would render meaningless the gesture of comity underlying such immunity; it would distract from efforts to have grievances regarding official state conduct resolved through government-to-government

channels; and it would subject the official conduct of foreign states to judgment in U.S. courts.

For these reasons, it is not surprising that, at the time of the enactment of the FSIA, it was settled that the sovereign immunity of a foreign state extended to individual officials sued for official-capacity acts. *See Restatement (Second) of the Foreign Relations Law of the United States* § 66(f) (1965) ("[t]he immunity of a foreign state . . . extends to . . . any . . . official . . . with respect to acts performed in his official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state"); *Heaney v. Government of Spain*, 445 F.2d 501, 504 (2d Cir. 1971) ("immunity of a foreign state extends to any . . . official or agent of the state with respect to acts performed in his official capacity") (internal quotation marks omitted); *see also Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1101 (9th Cir. 1990) (common law prior to the FSIA "extended immunity to individual officials acting in their official capacity"). That principle has deep roots in American jurisprudence. As the Attorney General of the United States observed 15 years *before* Chief Justice Marshall's landmark decision in *The Schooner Exchange*, "it is . . . well settled . . . that a person acting under a commission from the sovereign of a foreign nation is not amenable for what he does in pursuance of his commission, to any judiciary tribunal in the United States." 1 Op. Att'y Gen. 81, 1797 WL 427 (1797).[2]

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[2] *See also* U.S. Dep't of Justice Letter Br. at 3, *Kensington Int'l Ltd. v. Itoua*, Nos. 06-1763 & 06-2216 (2d Cir. filed May 23, 2007) ("*Kensington* Letter Br.") ("American jurisprudence has long recognized individual officials of foreign sovereigns to be immune from civil suit with respect to their official acts"); Statement of Interest of the United States of America at 4-7,

As the United States has previously explained, moreover, under the common law, the immunity of foreign officials was absolute: "the immunity . . . recognized for foreign officials acting in their official capacity did not merely match, but rather exceeded, that of the state: even if the state could be sued for an official's acts under the "restrictive theory" of immunity[3] in place at the time of the adoption of the FSIA, "the official himself could not be." *Kensington* Letter Br. at 8; *see also* Statement of Interest of the United States at 5, *Chuidian v. Philippine Nat'l Bank*, Case No. 86-2255-RSWL (C.D. Cal. filed Mar. 21, 1988) ("*Chuidian* Statement") ("While United States law, through the FSIA, recognizes only restrictive immunity for foreign sovereigns, the rationale for the FSIA's exceptions to absolute immunity . . . does not apply to an official carrying out official duties for the sovereign.").[4] Under the common law,

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Matar v. Dichter, No. 05 Civ. 10270 (S.D.N.Y. filed Nov. 17, 2006) ("*Dichter* Statement").

[3] Under the restrictive theory, "immunity [wa]s confined to suits involving the foreign sovereign's public acts, and d[id] not extend to cases arising out of a foreign state's strictly commercial acts." *Verlinden*, 461 U.S. at 487.

[4] *Greenspan v. Crosbie*, No. 74 Civ. 4734, 1976 WL 841 (S.D.N.Y. Nov. 23, 1976), illustrates this point. There, the plaintiffs brought a class action alleging violations of the U.S. securities laws against "the Province of Newfoundland and Labrador, and three of its highest officials." *Id.* at *1. The State Department submitted a suggestion of immunity recognizing the absolute immunity of the officials from the suit. *See id.* The Department, however, took the position that the Province itself did not enjoy immunity and was subject to suit for acts that fell "within the exceptions to immunity specified in the [Department's] Suggestion." *Id.* The court held that the "individual defendants" were "remove[d]" from the case while proceeding to exercise jurisdiction over the Province. *Id.* at *2.

therefore, it was well established that a foreign state's sovereign immunity extended to the official-capacity acts of individuals and that such immunity was unconditional – confirming that individual immunity for official-capacity acts has long been a crucial facet of a foreign state's sovereign immunity.

The FSIA – which Congress intended as a comprehensive codification of the common law – embodies these same principles. Indeed, an overwhelming number of courts have concluded that the immunity of a foreign state under the FSIA also governs official-capacity suits against individual officials.[5]

Finally, because a state cannot act except through its officials, and because the immunity of foreign officials for official-capacity acts is accordingly derived from the immunity of the state, it follows that such immunity continues even after a foreign official leaves office. Indeed, we are aware of no case (other than the decision below) in which a U.S. court has concluded that official-capacity immunity disappears or even dissipates when an official is no longer in the employ of his or her government. Such a "counter-intuitive" concept of individual immunity would represent "a dramatic departure from the common law of foreign sovereign immunity," which "made no distinction between the time of the commission of official acts and the time of suit." *Belhas v. Ya'alon*, 515 F.3d 1279, 1285 (D.C. Cir. 2008); *see also Restatement (Second) of the Foreign Relations Law of the United States* § 66(f); *Matar v. Dichter*, 563 F.3d

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[5] *See, e.g., In re Terrorist Attacks*, 538 F.3d at 80-85; *Keller v. Central Bank of Nigeria*, 277 F.3d 811, 815 (6th Cir. 2002); *Byrd v. Corporacion Forestal y Industrial de Olancho S.A.*, 182 F.3d 380, 388 (5th Cir. 1999); *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 671 (D.C. Cir. 1996); *Chuidian*, 912 F.2d at 1103.

9, 14 (2d Cir. 2009) ("Common law recognizes the immunity of former foreign officials. At the time the FSIA was enacted, the common law . . . recognized an individual official's entitlement to immunity for acts performed in his official capacity. An immunity based on acts – rather than status – does not depend on tenure in office.") (citations and internal quotation marks omitted).

II. THE FSIA APPLIES TO INDIVIDUAL OFFICIALS SUED FOR OFFICIAL-CAPACITY ACTS, AND SUCH IMMUNITY DOES NOT DIVEST UPON RETIREMENT FROM OR RELINQUISHMENT OF OFFICIAL DUTIES

As explained above, the purposes of foreign sovereign immunity require that such immunity – whatever its source – extend to individual officials sued for official-capacity acts. Whether or not such immunity lies *exclusively* in the FSIA, the text, structure, history, and purposes of the FSIA establish that, at the very least, the statute does apply to officials sued for official-capacity acts and that such immunity does not dissipate when an official leaves or retires from office or otherwise ceases to perform official functions. The Fourth Circuit's contrary – and outlying – holdings on these issues are wrong.

A. The Text, Structure, History, and Purposes of the FSIA Establish That It Applies to Individuals Sued for Official-Capacity Acts

1. The FSIA provides that "a foreign state shall be immune from the jurisdiction" of U.S. courts. 28 U.S.C. § 1604. The FSIA defines "foreign state" to "include[]," among other things, "a political subdivision of a foreign state or an agency or instrumentali-

ty of a foreign state." *Id.* § 1603(a). But that definition in no way exhausts the meaning of the phrase. "[T]he term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle." *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 99-100 (1941); *see also Puerto Rico Maritime Shipping Auth. v. ICC*, 645 F.2d 1102, 1112 n.26 (D.C. Cir. 1981) ("It is hornbook law that the use of the word 'including' indicates that the specified list . . . that follows is illustrative, not exclusive.").

The contrast between Congress's use of the term "means" in the definition of "agency or instrumentality" in § 1603(b) and "includes" in the definition of "foreign state" in § 1603(a) strengthens the conclusion that the definition of "foreign state" does not cover the waterfront: had Congress intended that result it would have said that a "foreign state" *means* "a political subdivision of a foreign state or an agency or instrumentality of a foreign state." That difference in word choice must be presumed to be intentional. *See Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) ("[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted; alterations in original).

Furthermore, as a textual matter, the FSIA applies to official-capacity suits against individual officials because official-capacity acts are acts of the "foreign state" and such suits are accordingly against the "foreign state." Again, a state "can act only through its officers and agents." *Davis*, 100 U.S. at 263. Accordingly, "the acts of the official representatives

of the state *are those of the state itself*, when exercised within the scope of their delegated powers." *Underhill v. Hernandez*, 65 F. 577, 579 (2d Cir. 1895) (emphasis added), *aff'd*, 168 U.S. 250 (1897); *see also In re Terrorist Attacks*, 538 F.3d at 84 (citing *Underhill* for this proposition). Indeed, as explained, under the common-law regime in place at the time of Congress's enactment of the FSIA, a foreign official's immunity for official-capacity acts derived from the sovereign immunity of the state itself. *See, e.g.*, *Heaney*, 445 F.2d at 504 (the "immunity of a foreign state extends to any . . . official or agent of the state with respect to acts performed in his official capacity") (internal quotation marks omitted). For these reasons, the term "foreign state" in the FSIA is most naturally read to apply to suits challenging the official-capacity acts of officials.

Principles of domestic sovereign immunity bolster this textual analysis. The Eleventh Amendment withdraws jurisdiction over "any suit . . . against one of the United States" and makes no mention of state officials. U.S. Const. amend. XI. But, because "official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent," such official-capacity claims have long been governed by the Eleventh Amendment. *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978); *see also Kentucky v. Graham*, 473 U.S. 159, 166 (1985) ("an official-capacity suit" against an official of a domestic sovereign "is, in all respects other than name, to be treated as a suit against the [sovereign] entity"); *Edelman v. Jordan*, 415 U.S. 651, 663 (1974) ("[i]t is . . . well established that even though a State is not named a party to the action, the suit may nonethe-

less be barred by the Eleventh Amendment . . . when . . . the state is the real, substantial party in interest") (internal quotation marks and alterations omitted). Just as "a suit against a state official in his or her official capacity" is "no different from a suit against the State itself," *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989), official-capacity suits against foreign officials are best understood as suits against the "foreign state" and are therefore governed by the FSIA.

The purposes of the FSIA support this analysis. Congress enacted the FSIA as a "comprehensive statute" to "remedy" the "problem[]" that immunity decisions had rested with "two different branches" and were subject to a "variety of factors, . . . including diplomatic considerations." *Altmann*, 541 U.S. at 690-91 (internal quotation marks omitted); *see also Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989) (Congress "deci[ded] to deal comprehensively with the subject of foreign sovereign immunity in the FSIA"). A framework in which the sovereign immunity of foreign officials is outside the scope of the FSIA would substantially undermine Congress's objective of creating a comprehensive system of immunity that would be based on legal judgments rather than political and diplomatic calculations. *See In re Terrorist Attacks*, 538 F.3d at 83.[6]

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[6] Consistent with this view, upon enactment of the FSIA, State Department Legal Adviser Monroe Leigh recognized that the State Department would no longer be called upon to "make any sovereign immunity determinations after the effective date of [the FSIA]." *Text of Letter to the Attorney General from Department of State Legal Adviser* (Nov. 2, 1976), 75 Dep't State Bull. 649 (Nov. 1976). "[I]t would be inconsistent with the legislative intent of that Act," Mr. Leigh explained, "for the Executive Branch to file any suggestion of immunity on or after

2. The contrary reasoning of the Fourth Circuit – as well as that previously set forth by the United States – is unpersuasive.[7]

First, the Fourth Circuit's analysis of the text, structure, and legislative history of the FSIA began and ended with the premise that, if official-capacity suits against officials could not be considered suits against an "agency or instrumentality," then the FSIA does not apply to such suits. *See* Pet. App. 17a-20a. That premise is wrong. As explained above, a suit against a foreign official based on official-capacity acts is a suit against the "foreign state" itself. Furthermore, the FSIA's definition of "foreign state" – which includes the "agency or instrumentality" phrase that was the focus of the Fourth Circuit's

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January 19, 1977. After [the FSIA] takes effect, the Executive Branch will . . . play the same role in sovereign immunity cases that it does in other types of litigation – e.g., appearing as *amicus curiae* in cases of significant interest to the Government." *Id.*

[7] Although the United States previously has argued that the FSIA does not apply to foreign officials, *see, e.g.*, *Dichter* Statement at 10-23, the position of the United States has always been clear that common-law immunity for such officials is absolute, *see supra* pp. 11-12. Accordingly, the principal objection raised by the United States to applying the FSIA to foreign officials has always been that such immunity is *too narrow* compared to the common law, not that such immunity should not be recognized. *See, e.g.*, *Dichter* Statement at 17 (construing the FSIA as applicable to individuals "leads to problematic results," including the implication "that individual officials are subject to the same *exceptions* to immunity laid out in the FSIA for states and their agencies and instrumentalities"); *id.* at 2 ("[R]efusal by U.S. courts to grant immunity to foreign officials for their official acts could seriously harm U.S. interests, by straining diplomatic relations and possibly leading foreign nations to refuse to recognize the same immunity for American officials.").

decision – is not exhaustive of the category of persons and entities entitled to immunity under the statute. *See supra* pp. 13-16; *see, e.g., Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 151 (D.C. Cir. 1994) ("The nub of the dispute is whether the Bolivian Air Force counts as a 'foreign state' or rather as an 'agency or instrumentality' under section 1608."); *see id.* at 153 ("We hold that armed forces are as a rule so closely bound up with the structure of the state that they must in all cases be considered as the 'foreign state' itself, rather than a separate 'agency or instrumentality' of the state."); *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, 546 U.S. 450, 452 (2006) (per curiam) (noting the Solicitor General's position that "a defense ministry (unlike, say, a government-owned commercial enterprise) generally is not an 'agency or instrumentality' of a foreign state but an inseparable part of the state itself," and citing *Transaero*; remanding for consideration of this question).[8]

Second, contrary to the suggestion of the United States, it makes no difference that the legislative history of the FSIA notes that diplomatic and consular immunity would survive enactment of the FSIA. *See Dichter* Statement at 11 ("[T]he legislative history's only reference to any type of individual official –

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[8] On remand, the Ninth Circuit adopted the *Transaero* framework and concluded that the Iranian Ministry of Defense "constitutes an inherent part of the state of Iran," not an "agency or instrumentality" of the "foreign state" under the FSIA. *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Def. Sys., Inc.*, 495 F.3d 1024, 1035-36 (9th Cir. 2007), *rev'd on other grounds sub nom. Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, 129 S. Ct. 1732 (2009).

diplomatic or consular representatives – clarifies that the FSIA does not govern their immunity since the statute 'deals only with the immunity of foreign states.'") (quoting H.R. Rep. No. 94-1487, at 21 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6620). Consular and diplomatic immunity are specialized forms of immunity that serve different ends and offer distinct protections from the basic sovereign immunity afforded by the common law for official-capacity acts. *See Restatement (Second) of the Foreign Relations Law of the United States* § 66 cmt. b; *see also, e.g., Arcaya v. Paez*, 145 F. Supp. 464, 471-72 (S.D.N.Y. 1956) (diplomatic immunity applies to all judicial process but ends when diplomatic status ends), *aff'd*, 244 F.2d 958 (2d Cir. 1957); *Chuidian* Statement at 8 n.4 (noting that common-law sovereign immunity for individuals "should be distinguished from diplomatic or similar immunities which may be enjoyed by foreign government officials while they are in the United States"). That Congress did not expect the FSIA to affect diplomatic or consular immunity is in no way inconsistent with the theory that sovereign immunity for official-capacity acts would be governed by the FSIA.

Nor does it make any difference whether Congress actually focused on individual official-capacity suits in the legislative history. There is no "require[ment] that every permissible application of a statute be expressly referred to in its legislative history." *Moskal v. United States*, 498 U.S. 103, 111 (1990); *see Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980) ("In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark."); *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1009 (2008). As we

have explained, at the time Congress enacted the FSIA, it had long been established that individuals acting in their official capacity were entitled to claim the sovereign immunity of the foreign state. The appropriate inference is therefore that Congress understood that the immunity of the "foreign state" would extend to official-capacity acts of foreign officials. *See National Archives & Records Admin. v. Favish*, 541 U.S. 157, 169 (2004) (courts should "assume Congress legislated against [a] background of law, scholarship, and history when it enact[s]" a statute).

B. The Immunity for the Official-Capacity Acts of Individuals Does Not Disappear or Dissipate When an Official Leaves Office

1. The sovereign immunity of a "foreign state" under the FSIA – which applies to suits against individual officials for official-capacity acts – does not disappear or dissipate when an official leaves or retires from office (or otherwise ceases to perform official duties).

Here again, this principle follows directly from the principle that a state can act only through its officials and that the immunity of a "foreign state" under the FSIA must accordingly extend to foreign officials acting in their official capacity. The FSIA broadly provides that, subject to certain exceptions, "a foreign state shall be immune from the jurisdiction of the courts of the United States." 28 U.S.C. § 1604. Congress made no exception to that principle for circumstances in which an individual official involved in carrying out the official acts of the "foreign state" has ceased to perform his or her official functions.

A contrary conclusion would undermine the purposes of foreign sovereign immunity. As the D.C.

Circuit has explained, "[e]very act committed by a sovereign government is carried out by its officials and agents." *Belhas*, 515 F.3d at 1286. "To suppose that the sovereign's immunity protecting the individual official in the performance of his sovereign's business vanishes the moment he resigns, retires, or loses an election is to establish that he had no immunity at all. Even though the state's immunity survives his departure, it is difficult to say how it could act within its immunity without being able to extend that immunity to the individual officials who acted on its behalf." *Id.* Furthermore, suits against former officials challenging the legality of official-capacity acts undertaken on behalf of a foreign state "would have a significant impact on the foreign state and the United States' relations with that state," *id.* at 1291 (Williams, J., concurring), and "would destroy, not enhance . . . comity," *id.* at 1286 (majority opinion).

Finally, as two courts of appeals have recognized, the common law at the time of the enactment of the FSIA extended immunity to individual officials and drew no distinction based on whether officials remained in office. *See Matar*, 563 F.3d at 14; *Belhas*, 515 F.3d at 1285. Because the FSIA was passed against the backdrop of the common law, it must be "read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952). For that reason as well, the FSIA is most naturally read as embodying a principle of official individual immunity that – consistent with the common law – depends on whether the conduct challenged is official-capacity conduct of the "foreign state," not upon

whether the individual named as a defendant is still in the employ of the government.

2. The Fourth Circuit incorrectly concluded that this Court's decision in *Dole Foods* required a contrary result. *See* Pet. App. 25a.

Dole Foods involved interpretation of the term "agency or instrumentality." Specifically, the defendant claimed instrumentality status, which required showing, among other things, that "a majority of [the entity's] shares . . . *is* owned by a foreign state or political subdivision." 28 U.S.C. § 1603(b) (emphasis added). This Court held that "the plain text of this provision, because it is expressed in the present tense, requires that instrumentality status be determined at the time suit is filed." 538 U.S. at 478.

Official-capacity suits against individual officials, however, are best understood as suits against the "foreign state." *See supra* pp. 13-20. The grant of immunity to foreign states in § 1604, moreover, is not temporally bound. *See* 28 U.S.C. § 1604 ("a foreign state *shall be immune* from the jurisdiction of the courts of the United States") (emphasis added). The present tense language of the definition of "agency or instrumentality" in § 1603(b) simply does not bear on the question whether the official-capacity acts of individual officials remain the acts of a "foreign state" when an individual who undertook those acts leaves office. As explained above, the text and purposes of the FSIA foreclose the counterintuitive suggestion that an official's retirement from office would open the courthouse doors to suits challenging the official conduct of foreign states. *See supra* pp. 20-21.

III. IF THIS COURT CONCLUDES THAT THE FSIA DOES NOT APPLY TO INDIVIDUAL OFFICIALS SUED FOR OFFICIAL-CAPACITY ACTS, IT SHOULD CONFIRM THAT COMMON-LAW IMMUNITY IN SUCH CIRCUMSTANCES EXISTS AND IS ABSOLUTE

Although, at the time of enactment of the FSIA, common-law immunity applied to individual officials sued for official-capacity acts and was absolute, the Fourth Circuit's conclusion that the common law – and *only* the common law – provides a source of immunity for such officials would raise unnecessary risks for foreign states and their officials.

First, although immunity under the common law was unconditional, a return to the common law would tempt judges, in the tradition of the common law, to craft *ad hoc* exceptions to immunity. Absent a statutory standard to implement, these exceptions might be difficult to predict in advance. Indeed, it was "[d]ifficulties in implementing the principle [of sovereign immunity that] led Congress in 1976 to enact the [FSIA], resulting in more predictable and precise rules." *Kiowa Tribe of Oklahoma v. Manufacturing Techs., Inc.*, 523 U.S. 751, 759 (1998). A return to the common law would threaten that predictability. At the least, endorsement of the Fourth Circuit's approach would invite litigation regarding the contours of common-law immunity and foster uncertainty until those contours were settled. That outcome would run contrary to the principle that sovereign immunity is "immunity not only from liability, but also from the costs, in time and expense, and other disruptions attendant to litigation." *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841,

849 (5th Cir. 2000); *cf. Mitchell v. Forsyth*, 472 U.S. 511, 526-27 (1985) (qualified-immunity doctrines are intended to protect against burdens of litigation); *see infra* p. 25 n.10.

Second, a bifurcated approach to sovereign immunity – one in which the immunity of foreign states is governed by the FSIA and the immunity of foreign officials is governed by the common law – would allow plaintiffs, through the captioning of their complaint, to choose whether an immunity determination is made under the statutory framework of the FSIA or the common law. Plaintiffs who choose the common-law route, moreover, may then pressure the State Department to issue suggestions of immunity proposing withdrawal of common-law protections. *See, e.g., Chuidian*, 912 F.2d at 1100 (suggesting the State Department could issue suggestions "deny[ing] immunity"). Whether or not such suggestions would be proper or legal,[9] this outcome would risk regularly drawing the State Department into politically and diplomatically sensitive disputes. The long-term interests of the United States and the State Department would appear to lie in avoiding such circumstances. *See Sabbatino*, 376 U.S. at 436 (noting, in the act-of-state context, that "[o]ften the State

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[9] This Court has suggested that the State Department at times requested immunity when the restrictive theory would have denied it. *See Verlinden*, 461 U.S. at 487 ("As a consequence, foreign nations often placed diplomatic pressure on the State Department in seeking immunity. On occasion, political considerations led to suggestions of immunity in cases where immunity would *not* have been available under the restrictive theory.") (emphasis added). But whether the State Department could suggest the withdrawal of such immunity when the restrictive theory deemed that it applied would be an open question and a heavily litigated issue.

Department will wish to refrain from taking an official position, particularly at a moment that would be dictated by the development of private litigation but might be inopportune diplomatically").

Adhering to a well-established, defined statutory framework such as the FSIA obviates the possibility of ill-founded pronouncements that might interfere with the United States' interests. Indeed, avoiding these results was why Congress enacted the FSIA in the first place. *See Republic of Iraq v. Beaty*, 129 S. Ct. 2183, 2189 (2009) (Congress "t[ook] upon itself in the FSIA to 'free the Government' from the diplomatic pressures engendered by the case-by-case approach" to immunity); *see also* Curtis A. Bradley & Jack L. Goldsmith, *Foreign Sovereign Immunity, Individual Officials, and Human Rights Litigation*, 13 Green Bag 2d 9, 19 (2009) (explaining that the common-law regime was "characterized by unprincipled conferrals of immunity based on the political preferences of the presidential administration and case-by-case diplomatic pressures" and that the FSIA was designed to remedy such concerns).

If – notwithstanding these considerations – this Court concludes that the FSIA does not apply to individual officials sued for official-capacity acts, the Court should attempt to cabin the deleterious consequences that could result by providing guidance on the nature of common-law immunity.[10] *First*, the

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[10] The Fourth Circuit shunted the question of common-law immunity off into a hodgepodge of issues left open on remand. *See* Pet. App. 25a-26a. But such a course is contrary to the whole purpose of sovereign immunity, which is to protect sovereigns not merely from damages liability but also from the burdens of defending a lawsuit. *See, e.g., Gupta v. Thai Airways Int'l, Ltd.*, 487 F.3d 759, 763 n.6 (9th Cir. 2007) ("like claims of absolute or qualified immunity of a public official, foreign

Court should make clear that common-law immunity presumptively applies to officials sued for official-capacity acts. *See Restatement (Second) of the Foreign Relations Law of the United States* § 66(f); *Heaney*, 445 F.2d at 504; *supra* pp. 9-10. *Second*, the Court should affirm that such immunity is absolute and not subject to any exception. *See Greenspan*, 1976 WL 841, at *1-*2; *Kensington* Letter Br. at 8; *supra* pp. 11-12. *Finally*, the Court should make clear that such common-law immunity does not dissipate when an official leaves or retires from office. Recognition of this principle would accord with the common law at the time of the enactment of the FSIA[11] and would appear to be consistent with the views of the United States regarding the scope of individual immunity.[12]

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sovereign immunity is an *immunity from suit* rather than a mere defense to liability") (emphasis by the Ninth Circuit; internal quotation marks omitted); *Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748, 756 n.4 (2d Cir. 1998) ("Qualified immunity, like sovereign immunity, is an immunity from litigation and not just from liability."); *Federal Ins. Co. v. Richard I. Rubin & Co.*, 12 F.3d 1270, 1281 (3d Cir. 1993) ("[W]e adopt the prevalent view that sovereign immunity is an immunity from trial and the attendant burdens of litigation on the merits, and not just a defense to liability on the merits.") (internal quotation marks omitted). Issues of sovereign immunity should be resolved all at once, not piecemeal on multiple trips up and down through the appellate courts.

[11] *See Matar*, 563 F.3d at 14; *Belhas*, 515 F.3d at 1285; *supra* pp. 12-13.

[12] *See* Brief for the United States as Amicus Curiae at 7, *Federal Ins. Co. v. Kingdom of Saudi Arabia*, No. 08-640 (U.S. filed May 29, 2009) (stating that "Congress is unlikely to have conferred a time-limited immunity" under the FSIA for individuals under which "a plaintiff could circumvent [individual sovereign] immunity by waiting until an official left office").

Because it has now been more than three decades since Congress enacted the FSIA and because an overwhelming number of courts have applied that framework to individual officials sued for official-capacity acts, a precipitous return to common-law immunity without authoritative guidance from this Court would be treacherous. Were this Court to remand for consideration of common-law immunity without offering any guidance to lower courts with respect to the nature and scope of such immunity, years of litigation in this case and others would be sure to follow. Because that outcome would threaten the core purposes of foreign sovereign immunity, this Court should take all necessary steps to avoid it.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 08-1555

IN THE
Supreme Court of the United States

MOHAMED ALI SAMANTAR,

Petitioner,

—v.—

BASHE ABDI YOUSUF et. al,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF PROFESSORS OF INTERNATIONAL LITIGATION AND FOREIGN RELATIONS LAW AS *AMICI CURIÆ* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIÆ*

This brief of *amici curiae* is respectfully submitted in support of respondents by law professors with expertise in International Litigation and Foreign Relations Law of the United States.[1] Many of the *amici* have been honored to appear as *amici* in other cases before this Court. *Amici* submit this brief because they believe the present case raises issues critical to the proper interpretation of the Foreign Sovereign Immunities Act (FSIA) and the federal common law of official immunities, areas to which they have devoted extensive scholarly attention. In particular, *amici* believe that the arguments of petitioner in this case profoundly misunderstand the FSIA and its relationship to federal common law. *Amici* further believe that the court below properly read the FSIA in accordance with its text not to extend to former foreign officials such as petitioner, and that the court below properly did not address the question of petitioner's possible immunities under federal common law.

A list of the *amici* appears as Appendix A.

SUMMARY OF ARGUMENT

Expanding the scope of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1602 *et seq.*, to

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. The parties' written consents to the filing of this brief have been filed with the Clerk of the Court.

apply to individual foreign government officials finds no support in the text, structure, or history of the Act—and would raise a host of legal problems beyond those set forth by respondents. Such an expansive reading would create a conflict with the Torture Victim Protection Act (TVPA), Pub. L. No. 102-256, 106 Stat. 73 (1992) (reproduced at 28 U.S.C. § 1350 note), potentially immunize foreign officials from criminal prosecution, abolish head-of-state immunity, abolish any immunity for former foreign officials, and require the courts to develop a non-textual definition of what constitute official acts.

The issue before this Court is not whether, or under what circumstances, foreign officials should or should not have immunity. The issue is whether, when Congress enacted the FSIA to govern immunity claims of foreign states, it also displaced the pre-existing common law immunities of foreign officials.

The text, structure, and history of the FSIA demonstrate that it does not, and was not intended to, apply to the immunities of foreign officials. Rather, in enacting the FSIA, Congress left the immunity claims of foreign officials to be governed by federal common law, as they had been prior to the FSIA's enactment.[2]

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[2] Although best understood as a matter of federal common law, judicial application of foreign official immunities has been disciplined by reference to customary international law, *see, e.g.*, *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 137-46 (1812); *Berizzi Bros. Co. v. The Pesaro*, 271 U.S. 562, 575-76 (1926), and the views of the Executive Branch. *See, e.g.*, *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945); *Ex*

(cont'd)

As a textual matter, neither of the theories advanced by petitioner has merit. First, the FSIA governs only the immunity of "foreign state[s]." 28 U.S.C. § 1604. Although § 1603(a) defines this phrase to include "an agency or instrumentality of a foreign state," this expanded definition applies only to "legal person[s]," not to individuals. Second, contrary to petitioner's suggestions, a foreign official acting in an official capacity is not otherwise included in the ordinary meaning of the phrase "foreign state." The operative sections of the FSIA repeatedly distinguish between foreign states, on one hand, and officers and employees acting in an official capacity, on the other. *See id.* §§ 1605(a), 1605A(c), 1610.

The FSIA's history also does not support the idea that it includes foreign officials. Prior to the FSIA, the immunities of foreign officials were applied as a matter of federal common law, and there is no non-speculative reason to suppose that Congress intended to alter that practice. In enacting the FSIA, Congress was primarily concerned with problems that had arisen in the common-law regime governing the commercial activities of foreign states themselves. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486-89 (1983). Official

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parte Peru, 318 U.S. 578 (1943). This Court has never directly held that non-statutory foreign immunity decisions are a matter of federal rather than state common law, but that conclusion follows from *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421-27 (1964), holding that the closely analogous act of state doctrine must be applied as a matter of federal common law.

immunity cases were rare and had not attracted substantial attention as of 1976. Moreover, Congress was legislating against a domestic background in which the immunities of State officials were treated differently from the Eleventh Amendment immunities of States themselves. *See, e.g., Alden v. Maine*, 527 U.S. 706, 756-57 (1999); *Scheuer v. Rhodes*, 416 U.S. 232, 237-238 (1974). Congress would not have assumed that a suit against an individual for an official act would be treated the same as a suit against the sovereign itself. If Congress had intended such an equivalence, it would have said so directly.

Most importantly, reading the FSIA to cover individuals would raise a host of problems.

First, it would create a conflict with the TVPA. In extending liability for torture and extrajudicial killing to "[a]n individual [acting] under *actual* or apparent authority, or color of law, of any foreign nation," 28 U.S.C. § 1350 note, § 2(a) (emphasis added), Congress plainly intended to reach foreign officials acting in their official capacities.

Second, extending the FSIA to foreign officials might immunize them from criminal prosecutions brought by the United States. The text of § 1604 does not distinguish between civil and criminal jurisdiction, and under *Argentine Republic v. Amerada Hess Shipping Corp.*, "the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in federal court." 488 U.S. 428, 439 (1989). To date, U.S. courts have responded to claims of immunity from foreign officials facing criminal prosecution by reasoning that the FSIA does not apply to such officials and that any common law

immunities may be waived by the Executive Branch. If this Court extends the FSIA to foreign officials, lower courts will either have to hold them immune from criminal prosecution or create a non-textual exception to the language of § 1604 for criminal prosecutions.

Third, extending the FSIA to foreign officials would abolish the absolute immunity currently enjoyed by sitting heads of state and subject them to civil suits on a variety of claims including claims based on commercial activities, *see* 28 U.S.C. § 1605(a)(2), and noncommercial torts. *See id.* § 1605(a)(5). This would work a significant change in federal common law and place the United States in breach of customary international law.

Fourth, extending the FSIA to foreign officials would abolish any common law immunity of former officials. The precise scope of the immunities enjoyed by former officials under federal common law, if any, is not clear and is not before this Court. What is clear is that immunity under the FSIA depends not on the defendant's status at the time of the conduct but on the defendant's status at the time of the suit. *See Republic of Austria v. Altmann,* 541 U.S. 677, 696 (2004); *Dole Food Co. v. Patrickson,* 538 U.S. 468, 478-79 (2003). Thus, to the extent that former officials enjoy any immunities from suit at federal common law, applying the FSIA would remove those immunities.

Finally, extending the FSIA to foreign officials would still leave the question of what constitutes an "official act" unanswered. Petitioner contends that the FSIA applies to foreign officials only when they act in their official capacities. But because Congress

did not expect the FSIA to be applied to foreign officials, the FSIA contains no definition of this concept. Petitioner asks this Court to apply the FSIA to foreign officials despite their omission from the text of the statute and then to create an exception for acts not performed in an official capacity, again without any basis in the text. It would be simpler by far to hold that the FSIA does not apply to foreign officials and leave the scope of federal common law immunities potentially applicable to petitioner to be decided by the district court in the first instance.

ARGUMENT

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THE FOREIGN SOVEREIGN IMMUNITIES ACT CODIFIED IMMUNITIES OF FOREIGN STATES, BUT LEFT IMMUNITIES OF FOREIGN OFFICIALS GOVERNED BY FEDERAL COMMON LAW

I. THE IMMUNITIES OF FOREIGN OFFICIALS IN THE UNITED STATES ARE GOVERNED BY FEDERAL COMMON LAW UNLESS DISPLACED BY TREATY OR STATUTE

Traditionally, federal and state courts in the United States approached questions of sovereign immunity as a matter of common law, applied with reference to principles of customary international law. *See, e.g.*, *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 137-46 (1812); *Berizzi Bros. Co. v. The Pesaro*, 271 U.S. 562, 575-76 (1926). Beginning in the 1940s, this Court initiated a practice of applying common law immunities with almost complete deference to Executive Branch determinations. *See generally Republic of Mexico v.*

Hoffman, 324 U.S. 30 (1945); *Ex parte Peru*, 318 U.S. 578 (1943).

In 1952, in the so-called Tate Letter, the Executive Branch announced that it would relax the traditional view of absolute immunity for foreign states, expressed in cases such as *Berizzi Bros.*, *supra*, and allow suits based on foreign states' commercial activities. *See* Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), *reprinted in* 26 Dep't of State Bull. 984-85 (1952); *Verlinden*, 461 U.S. at 486-88.

As recounted in *Verlinden*, the Tate Letter introduced what proved to be an unsatisfactory situation in which the State Department's determinations of whether a foreign state's activities were commercial (and thus not entitled to immunity) became subject to diplomatic pressure. 461 U.S. at 487. In 1976 Congress responded with the FSIA, which replaced the common law immunity of foreign states with a statutory scheme that incorporated the Tate Letter's commercial activities exception and various others. *Id.* at 488-89.[3]

Prior to the FSIA, the practice of U.S. courts and the U.S. Department of State also treated the

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[3] Prior to the FSIA, diplomatic and consular immunities, which had previously been matters of common law, had been formalized in two treaties, the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 96, and the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261.

distinct questions of head-of-state immunity and foreign official immunity as matters of federal common law. *See Sovereign Immunity Decisions of the Department of State, May 1952 to January 1977*, 1977 Dig. U.S. Prac. Int'l L. 1017, 1020 (1977); *Restatement (Second) of the Law of Foreign Relations of the United States* § 66 (1965). Thus, the question here is whether, in addition to codifying foreign state immunity, the FSIA *also* codified immunity for foreign officials. If it did, it would displace the common law immunity these officials formerly enjoyed. But if it did not, presumably foreign officials retain whatever immunities they had at common law.[4] As a result, a central premise of petitioner's argument is mistaken. The question is not whether foreign officials should or should not have immunity. The question is whether their immunities are governed by the FSIA or by federal common law.

As set forth below, the FSIA's text, structure, and history demonstrate that the FSIA does not apply to immunity claims of foreign officials. The Fourth Circuit correctly dismissed petitioner's claims under the FSIA and remanded so that the district court could consider his immunities under federal common law. *See Yousuf v. Samantar*, 552 F.3d 371, 383-84 (4th Cir. 2009).

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[4] This brief expresses no opinion on the scope of common law immunities for foreign officials or former foreign officials.

II. THE FSIA'S TEXT MAKES CLEAR THAT IT CODIFIES ONLY THE IMMUNITIES OF FOREIGN STATES AND NOT THE IMMUNITIES OF FOREIGN OFFICIALS

Nothing in the FSIA's text directly extends its provisions to foreign officials, let alone to former foreign officials such as Samantar. By its terms, the FSIA grants immunity only to "foreign state[s]." 28 U.S.C. § 1604. A "foreign state" is in turn defined to "include[]" "a political subdivision of a foreign state or an agency or instrumentality of a foreign state." *Id.* § 1603(a). Nonetheless petitioner and some lower courts offer two theories under which officials might be included within the definition of "foreign state." First, an official might be an "agency or instrumentality of a foreign state." Second, the phrase "foreign state" might somehow include foreign officials acting in their official capacities (however defined), even though the statute does not say so directly. Neither suggestion is a plausible interpretation of the FSIA's text.

A. A Foreign Official Is Not an "Agency or Instrumentality of a Foreign State"

The first court of appeals decision to extend the FSIA to foreign officials, fourteen years after the statute's enactment, found that the phrase "agency or instrumentality of a foreign state" might include foreign officials. *See Chuidian v. Philippine Nat. Bank*, 912 F.2d 1095, 1103 (9th Cir. 1990). However, the FSIA's text decisively rejects this reading, as the court below persuasively explained. *See Yousuf*, 552 F.3d at 379-81.

First, § 1603(b)(1) defines "agency or instrumentality" to mean "a separate legal person, corporate or otherwise." "Legal person" is a term of art routinely used to describe legally-created entities, whether "corporate" (*i.e.,* corporations) or "otherwise" (*i.e.,* partnerships, foundations, etc.), in contrast to "natural persons" (meaning individuals). *See, e.g., Nixon v. Missouri Municipal League,* 541 U.S. 125, 134 (2004) ("In customary usage, we speak simply of prohibiting a natural *or* legal person from doing something.") (emphasis added). Indeed, the FSIA itself later uses the phrase "natural person" to mean an individual—presumably in contrast to "legal person." *See* 28 U.S.C. § 1610(f)(1)(B). As the House Report specifically noted,

> [t]he first criterion, that the entity be a separate legal person, is intended to include a corporation, association, foundation or any other entity which, under the law of the foreign state where it was created, can sue or be sued in its own name, contract in its own name or hold property in its own name."

H.R. Rep. No. 94-1487, at 15, 1976 U.S.C.A.A.N. 6604, 6614.

Second, § 1603(b)(2) requires that, to qualify as "an agency or instrumentality of a foreign state," an entity must be "an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." Obviously the second phrase of this definition is directed toward legally-created entities such as corporations, since individuals do not have "ownership interests"; the word "organ" likewise

indicates a legally-created component such as a ministry rather than an individual.

Third, § 1603(b)(3) requires that, to qualify as "an agency or instrumentality of a foreign state," an entity must not be "a citizen of a State of the United States *as defined in section 1332(c) and (e) of this title,* nor created under the laws of any third country." (Emphasis added). Sections 1332(c) and (e) define how the citizenship of *corporations* is determined. Thus all three prongs of § 1603(b)'s definition of "agency or instrumentality of a foreign state" demonstrate an understanding that it encompasses legally-created entities and not individuals.

Further, the FSIA's provisions for service of process on "an agency or instrumentality of a foreign state" in § 1608(b) mirror Fed. R. Civ. P. 4(h)'s provisions governing service on a corporation, partnership, or association. The principal way service is to be effected, under § 1608(b)(2), is "by delivery of a copy of the summons and complaint . . . to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States"—a provision obviously framed for legally-created entities. In contrast, § 1608(b) contains no reference at all to the most common way of serving process upon individuals present in the United States, personal delivery to the actual person being sued. *See, e.g.,* Fed. R. Civ. P. 4(e) & (f) (service of process on individuals).

Recognizing the weakness of the Ninth Circuit's view in *Chuidian,* Samantar largely abandons it. *See* Pet. Br. at 45-47 (relegating claim that he is an

"agency or instrumentality of a foreign state" to a few pages at the end of the brief). Instead, he advances a distinct argument that FSIA's phrase "foreign state" implicitly includes foreign officials acting in their official capacities, even though § 1603's definitions do not say so directly. As the next section shows, the FSIA's text refutes this argument as well.

B. The FSIA Does Not Include Foreign Officials as Part of the Foreign State Itself

Nothing in the FSIA suggests that the phrase "foreign state" includes foreign officials, and much stands against it. To begin, the ordinary meaning of "foreign state" obviously does not encompass individuals such as Samantar: one would, in common language, say not that Samantar *is* a foreign state, but that he is an individual who *acted on behalf of* a foreign state. If Congress meant to extend the definition of "foreign state" to something that phrase does not obviously encompass, one would expect it to do so in the statutory definitions. The FSIA's definitions section—§ 1603(a)—*does* extend the definition of "foreign state" to things that phrase does not obviously encompass, by declaring that the phrase foreign state "includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state." However, § 1603(a) does not list foreign officials as similarly "include[d]." The strong negative implication of this provision is that people or entities not listed in § 1603(a)—and not otherwise obviously encompassed within the meaning of "foreign state"—are not included within its definition.

To be sure, as petitioner argues, § 1603(a)'s list is not necessarily exhaustive. But natural persons are fundamentally different from "political subdivisions," "agencies," and "instrumentalities." If Congress intended the definition to "include" a category so utterly different from those it enumerated, one would expect Congress to say so explicitly. *See United States v. Williams,* 553 U.S. 285, ___, 128 S. Ct. 1830, 1839 (2008) ("*noscitur a socii* . . . counsels that a word is given more precise content by the neighboring words with which it is associated.")

Looking beyond § 1603 to the statute as a whole, the FSIA's text makes clear in various ways that the term "foreign state" does not "include" foreign officials. First, the FSIA repeatedly refers to "foreign state[s]" *and* their officials and employees acting in an official capacity. For example, § 1605(a)(5) provides an exception for noncommercial torts "occurring in the United States and caused by the tortious act or omission of that foreign state *or of any official or employee of that foreign state while acting within the scope of his office or employment.*" (Emphasis added). If the term "foreign state" included foreign officials, plainly it would not have been necessary to follow the phrase "of that foreign state" with the phrase "or of any official or employee of that foreign state while acting within the scope of his office or employment."[5] Similarly, § 1605A(c)

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[5] Section 1606 also provides that in situations where immunity does not apply "a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages." If foreign officials are included within the phrase "foreign state" (but are not "agenc[ies] or instrumentalit[ies] *(cont'd)*

provides a private right of action under certain circumstances against "[a] foreign state that is or was a state sponsor of terrorism . . . *and any official, employee or agent of that foreign state while acting within the scope of his or her office, employment or agency*. . . ." (Emphasis added). And § 1610(a)(5) allows execution of a judgment upon "any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state *or its employees* . . . ." (Emphasis added).

Second, § 1608(a) sets forth comprehensive provisions on the manner of service of process upon a "foreign state." Like § 1608(b), which as discussed above provides for service on "agencies or instrumentalities," § 1608(a) lacks any reference to the usual ways of serving process on an individual. Under § 1608, the principal ways of serving process on a "foreign state" are by "sending a copy of the summons and complaint . . . to the head of the ministry of foreign affairs of the foreign state" (§ 1608(a)(3)) or by sending the summons and complaint to the U.S. Secretary of State, who "shall transmit . . . the papers through diplomatic channels to the foreign state" (§ 1608(a)(4)). These are decidedly odd ways of serving process upon individual officials (especially former foreign officials living in the United States).

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thereof"), then state-owned corporations would be liable for punitive damages while individual officials would not be. It seems unlikely that Congress would have drawn such a distinction.

Third, under petitioner's argument, "foreign state" apparently includes not just foreign officials but any person or entity that acts on behalf of the foreign state. Among other things, that would include corporations not majority-owned by the foreign state or not incorporated under the laws of the foreign state, contrary to the definition of "agency or instrumentality" in § 1603(b). It would also include individual U.S. citizens who at one point had acted for a foreign state, to whom application of § 1608(a)'s service-of-process provisions would be especially bizarre.

In contrast, petitioner points to nothing in the FSIA's text suggesting that "foreign state" includes officials. Nor does petitioner identify any awkward textual results if the term "foreign state" does not include officials. To the contrary, the FSIA as a whole is internally consistent and fully understandable when read to apply (as its plain text says) to foreign states and their agencies or instrumentalities, and not to individuals.

Petitioner essentially offers three arguments why Congress, in drafting the FSIA, must have thought the phrase foreign state "includes" foreign officials acting in their official capacities, even though it did not say so. Petitioner's broadest proposition is that, if the FSIA does not cover foreign officials, such officials might never be entitled to immunity. As noted in Part I, this proposition is simply incorrect. As the court below recognized, *see Yousuf*, 552 F.3d at 383-84, federal common law would continue to govern the immunities to which foreign officials might be entitled, as it did prior to enactment of the FSIA. *See also Ye v. Zemin*, 383

F.3d 620, 625 (7th Cir. 2004) (reaching a similar conclusion with respect to head-of-state immunity).

Petitioner also argues that Congress in enacting the FSIA would have assumed that the term "foreign state" naturally includes officials acting in their official capacities because suits against such officials are in effect suits against the state. Such an assumption seems unlikely for two reasons. First, the law of foreign official immunity was not well developed in U.S. courts prior to enactment of the FSIA. Relatively few cases raised the issue. *See Sovereign Immunity Decisions*, *supra*, at 1020 (listing only six such cases between 1952 and 1977). Although generally these cases concluded or assumed that some forms of official immunity existed, it was not at all clear that these immunities paralleled the immunity of the state itself, that they applied to all officials or official acts, or that they extended to former officials. If foreign official immunities of the breadth Samantar claims did not clearly exist as part of federal common law prior to the FSIA's enactment, there is no reason to think Congress adopted them in the FSIA *sub silentio*.

Moreover, state immunity and official immunity are *not* treated equivalently in the analogous situations with which Congress would have been most familiar. Under the Eleventh Amendment, States of the United States generally have sovereign immunity from suit. *Alden v. Maine*, 527 U.S. 706, 756 (1999). However, suits against State officials (for example under 42 U.S.C. § 1983), even for acts done officially, have historically not been treated as suits against the State itself under the Eleventh Amendment, so long as recovery is sought against

the individual personally and not against the State. *See, e.g., Scheuer v. Rhodes*, 416 U.S. 232, 237-238 (1974). As this Court has explained:

> Nor does sovereign immunity bar all suits against state officers. . . . Even a suit for money damages may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, so long as the relief is sought not from the state treasury but from the officer personally.

Alden, 527 U.S. at 756-57. Rather, State officials are accorded different and more limited types of immunities, such as qualified immunity. *Scheuer*, 416 U.S. at 238-49. Thus it is highly unlikely that Congress assumed state immunity and official immunities were equivalent; rather, Congress legislated against a background in which they represented different types of immunities, with different contents and limitations.

Finally, petitioner contends that Congress wanted a comprehensive solution to all aspects of foreign sovereign immunity in passing the FSIA, and thus would have intended to cover officials as well as foreign states. This proposition is pure speculation.

Congress enacted the FSIA because it wanted to resolve problems that had arisen under the post-Tate Letter regime. *See Verlinden*, 461 U.S. at 486-88. But those problems related principally to foreign state immunity arising from foreign states' arguably commercial activities. As noted above, very few cases

of official immunities arose in the immediate pre-FSIA period.[6] State Department materials prepared immediately after the FSIA's enactment assumed that the FSIA did *not* cover foreign officials. *See Sovereign Immunity Decisions*, *supra*, at 1020 (stating that "the Foreign Sovereign Immunities Act does not deal with the immunity of individual officials, but only that of foreign states and their political subdivisions, agencies and instrumentalities"). The Department has continued to file suggestions of immunity in suits against foreign officials since 1976. *See, e.g.*, 1978 Dig. U.S. Prac. Int'l L. 641-43 (discussing suggestion of immunity for Charles, Prince of Wales, in *Kilroy v. Windsor*, No. C-78-291 (N.D. Ohio 1978)); *Saltany v. Reagan*, 702 F. Supp. 319, 320 (D.D.C. 1988), *aff'd in part and rev'd in part on other grounds*, 886 F.2d 438 (D.C. Cir. 1989) (suggestion of immunity for British Prime Minister Margaret Thatcher); *Ye*, 383 F.3d at 627 (suggestion of immunity for Chinese President Jiang Zemin).

Thus, the best conclusion from the FSIA's text, structure, and history is that Congress simply was not thinking of foreign officials in passing the FSIA. And if that is so, then the FSIA should be limited to what Congress had in mind—the immunity of foreign states—and the immunities of foreign officials should continue to be governed by federal common law.

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[6] The FSIA was passed prior to *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), which permitted human rights suits against foreign officials under the Alien Tort Statute, 28 U.S.C. § 1350.

III. READING THE FSIA TO DISPLACE THE COMMON LAW IMMUNITIES OF FOREIGN OFFICIALS WOULD RAISE A HOST OF PROBLEMS

Because the FSIA was not designed to cover foreign officials, extending it to do so would create a host of unintended problems—problems that could only be solved by creating a series of non-textual exceptions to § 1604. The simpler solution by far would be to hold that the FSIA does not apply to foreign officials and leave the scope of federal common law immunities potentially applicable to petitioner to be decided by the district court in the first instance.

A. Extending the FSIA to Foreign Officials Would Create a Conflict with the Torture Victim Protection Act

The Torture Victim Protection Act (TVPA), Pub. L. No. 102-256, 106 Stat. 73 (1992) (reproduced at 28 U.S.C. § 1350 note), provides a cause of action to aliens and U.S. citizens against "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation" engages in torture or extrajudicial killing. 28 U.S.C. § 1350 note, § 2(a). The TVPA's plain language, and in particular its extension to claims for acts done under the "actual" authority of a foreign nation, make clear that Congress believed U.S. courts would have jurisdiction over foreign officials acting in their official capacities.

Extending the FSIA to foreign officials' official acts, as petitioner proposes, would deny U.S. courts jurisdiction for most such TVPA claims (except in

the unlikely event that one of the § 1605 exceptions applied). This conflict could be resolved only by dramatically narrowing the scope of the TVPA contrary to its plain language, creating additional non-textual exceptions to § 1604 of the FSIA, or finding that the TVPA modified the FSIA's jurisdictional limits *sub silentio*. None of these readings is plausible or necessary. There need be no conflict between the TVPA and the FSIA because the TVPA is limited to "individuals," while the FSIA applies only to "foreign states."

B. Extending the FSIA to Foreign Officials Might Immunize Them from Criminal Prosecutions Brought by the United States—a Result Not Intended by Congress

The text of § 1604 does not distinguish between civil and criminal jurisdiction. It provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. § 1604. In *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989), this Court held that § 1604 overrides other grants of subject matter jurisdiction so that "the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in federal court." Nothing in *Amerada Hess* limits its reasoning to civil cases.

If a foreign official were deemed a "foreign state," then § 1604 might limit subject matter jurisdiction over criminal prosecutions under 18 U.S.C. § 3231 in the same way that it limits subject matter jurisdiction over alien tort suits under 28 U.S.C. § 1350. *See Amerada Hess*, 488 U.S. at 434-39. In

other words, no prosecution for violation of a federal criminal statute could be brought unless one of the exceptions to immunity found in the FSIA applied.

Congress has passed a number of statutes criminalizing offenses in which foreign officials may participate. For example, the Torture Convention Implementation Act, 18 U.S.C. §§ 2340-2340B, provides criminal penalties for torture (and conspiracy to commit torture) outside the United States whenever the offender is present in the United States, irrespective of the nationality of the victim or the alleged offender. *Id.* § 2340A. Since torture is defined to include only acts "committed by a person acting under the color of law," *id.* § 2340, defendants under the Act will often be foreign officials. The Genocide Accountability Act, 18 U.S.C. §§ 1091-93, criminalizes genocide and incitement to genocide if the alleged offender is brought into, or found in, the United States, even if that conduct occurred outside the United States, *see id.* § 1091(e), while the Child Soldiers Accountability Act, 18 U.S.C. § 2442, makes it a federal crime to recruit children under 15 to serve in "an armed force or group," *id.* § 2442(a)(1), if "the alleged offender is present in the United States, irrespective of the nationality of the alleged offender." *Id.* § 2442(c)(3). The Antiterrorism Act, 18 U.S.C. §§ 2331-2339, establishes criminal penalties for a broad range of terrorism-related offenses including providing material support to terrorists, providing material support to terrorist organizations, and financing terrorism. *See id.* §§ 2339A-2339C. And, of course, foreign officials may participate in more run-of-the-mill criminal offenses such as drug trafficking. *See,*

e.g., *United States v. Noriega*, 117 F.3d 1206 (11th Cir. 1997).

To date, U.S. courts have responded to claims of immunity from foreign officials facing prosecution by reasoning that the FSIA does not apply to such officials, that their immunity is therefore governed by common law, and that such immunity is waivable by the Executive Branch. In *Noriega*, the defendant claimed head-of-state immunity as the *de facto* leader of Panama.[7] "Because the FSIA addresses neither head-of-state immunity, nor foreign sovereign immunity in the criminal context," the Eleventh Circuit reasoned, the Act had not displaced the pre-existing law governing such immunity. *Id.* at 1212. "As a result, this court must look to the Executive Branch for direction on the propriety of Noriega's immunity claim." *Id.* The court concluded that "by pursuing Noriega's capture and this prosecution, the Executive Branch has manifested its clear sentiment that Noriega should be denied head-of-state immunity." *Id.*

In *United States v. Emmanuel*, No. 06-20758-CR, 2007 WL 2002452 (S.D. Fla. July 5, 2007), the defendant Charles Emmanuel (a.k.a. Chuckie Taylor) was indicted for violating the Torture Convention Implementation Act and raised the FSIA as a defense based on his position as a commander of the Antiterrorism Unit of the Liberian Armed Security Force. The district court rejected the claim of immunity on two grounds. First, it held the

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[7] Head-of-state immunity is further discussed below in Part III.C.

defendant had not acted as a foreign sovereign despite having acted under color of state law. *See id.* at *14. Second, it held that the FSIA does not apply in criminal cases against foreign officials where a prosecution has been initiated by the Executive Branch. *See id.*

While the common law immunities of foreign officials have generally been understood to be waivable by the Executive Branch, at least in the context of criminal prosecutions, the immunity of foreign states under the FSIA is not. This Court's decision in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), is not to the contrary. In *Altmann*, this Court observed that "nothing in our holding prevents the State Department from filing statements of interest suggesting that courts decline to exercise jurisdiction in particular cases implicating foreign sovereign immunity." *Id.* at 701. But the import of that observation is unclear. Responding to Justice Kennedy's objection that inviting case-by-case intervention by the Executive "does serious harm to the constitutional balance between the political branches," *id.* at 733 (Kennedy, J., dissenting),[8] the Court clarified that it was not holding "that executive intervention could or would trump considered application of the FSIA's more neutral principles . . . ." *Id.* at 702 n.23. Whatever the precise effect of this language from *Altmann*, it applies only

[8] Justice Kennedy noted that case-by-case intervention in cases governed by federal common law rather than by the FSIA did not raise the same concerns, since "[t]he law that governed before the FSIA's enactment allowed unilateral Executive authority in that regard." *Id.* at 734 (Kennedy, J., dissenting).

where the State Department suggests "that courts *decline* to exercise jurisdiction." *Id.* at 701 (emphasis added). A statement of interest suggesting that a court waive the immunity of a foreign state under the FSIA and *exercise* jurisdiction would appear to be ineffective under any reading of *Altmann*.

Not only does the text of the FSIA contain no exception allowing the Executive Branch to waive the immunity of a "foreign state," the exceptions to immunity that the FSIA does contain are a poor fit for criminal cases. Most of them are limited to cases where rights in property are at issue, *see, e.g.*, 28 U.S.C. § 1605(a)(3) (expropriation); *id.* § 1605(a)(4) (property in the United States), where money damages are sought, *see, e.g., id.* § 1605(a)(5) (noncommercial torts); *id.* § 1605A (terrorism), or where for other reasons a criminal prosecution would not be involved. *See, e.g., id.* § 1605(a)(6) (enforcement of arbitral agreements or awards); *id.* § 1605(b) (maritime liens); *id.* § 1607 (counterclaims). The only exceptions that might permit criminal prosecutions are § 1605(a)(1), which applies when a foreign state has waived its immunity, and § 1605(a)(2), which applies when "the action is based upon a commercial activity." But when the Executive Branch has made a decision to prosecute a foreign official under a criminal statute passed by Congress, whether the prosecution may proceed should not have to depend on whether the foreign state has waived immunity or whether it involves a "commercial activity."

It seems clear that Congress was not thinking about criminal prosecutions when it passed the FSIA. But that is because it was not thinking about

individuals. Rather Congress was concerned about the immunity of foreign states, which cannot be criminally prosecuted in U.S. courts.[9] If, contrary to Congress's intention, this Court extends the FSIA to cover foreign officials, the lower courts will face an unpalatable choice. They will either have to hold that foreign officials are immune from prosecution under acts of Congress that were plainly meant to reach them, or they will have to create a non-textual exception to the language of § 1604 for criminal prosecutions.

C. Extending the FSIA to Foreign Officials Would Abolish Head-of-State Immunity

Petitioner contends that the FSIA is a "comprehensive codification" of the immunities of both foreign states and foreign officials. Pet. Br. 16. If the FSIA applies comprehensively to foreign officials, there is no basis in the text for distinguishing former officials like Samantar from current officials, including sitting heads of state. At common law, and under customary international law, sitting heads of state have enjoyed absolute immunity from civil suits and criminal prosecutions. If this Court extends the FSIA to cover foreign officials, that immunity would be removed and

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[9] Corporations can be criminally prosecuted in U.S. courts, and some corporations are agencies or instrumentalities of a foreign state under 28 U.S.C. § 1603(b). *Amici* are not aware of any pre-FSIA cases in which state-owned corporations were criminally prosecuted for violations of U.S. law, and most such prosecutions (*e.g.* for violations of antitrust or securities law) would today fall within the "commercial activities" exception. *Id.* § 1605(a)(2).

sitting heads of state would be subject to civil suits under the exceptions contained in the FSIA.

Between 1952 and 1976, issues of head of state immunity arose rarely in U.S. courts but were subject to the same procedures of executive suggestion as issues of foreign state immunity. *See Sovereign Immunity Decisions, supra*, 1020, 1053-54, 1077. In testimony on the proposed FSIA, Bruno Ristau, Chief of the Department of Justice's Office of Foreign Litigation, explained that the Act would not affect head of state immunity: "Now we are not talking, Congressman, in terms of permitting suit against the Chancellor of the Federal Republic [of Germany]. . . . That is an altogether different question." Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary, 93d Cong., 1st Sess. 16 (1973) (testimony of Bruno Ristau).[10]

After passage of the FSIA, the Department of State continued to file suggestions of immunity in cases involving foreign heads of state. U.S. courts held that the FSIA did not govern head-of-state immunity, that pre-1976 procedures continued to apply, and that the Executive's determinations of immunity were conclusive.[11]

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[10] Ristau's testimony was on a prior version of the bill, but as the House Report on the FSIA noted, the FSIA "is essentially the same bill as was introduced in 1973, except for technical improvements that have been made in the interim." H.R. Rep. No. 94-1487, at 10, 1976 U.S.C.A.A.N. 6604, 6608.

[11] *See, e.g., Ye*, 383 F.3d at 625-27; *Noriega*, 117 F.3d at 1212; *First Am. Corp. v. Al-Nahyan*, 948 F. Supp. 1107, 1119 (D.D.C. *(cont'd)*

At common law, the immunity of sitting heads of state from the jurisdiction of U.S. courts was generally deemed to be absolute.[12] This is consistent with customary international law as articulated most recently by the International Court of Justice (ICJ) in the *Arrest Warrant Case*. *See Case Concerning Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.)*, 2002 I.C.J. 3 (Feb. 14, 2002). The ICJ observed that "in international law it is firmly established that . . . holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal." *Id.* at 20-21. On the facts of that

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1996); *Lafontant v. Aristide*, 844 F. Supp. 128, 137 (E.D.N.Y. 1994); *Saltany*, 702 F. Supp. at 320. Courts have similarly held that the Executive's determinations of diplomatic status are conclusive for purposes of diplomatic immunity. *See, e.g., Abdulaziz v. Metro. Dade County*, 741 F.2d 1328, 1331 (11th Cir.1984); *Carrera v. Carrera*, 174 F.2d 496, 497 (D.C. Cir. 1949). It is a separate question what weight courts should give to suggestions of immunity that do not depend on the Executive's recognition of an individual's status as a current head of state or diplomatic agent, and that question is not before this Court.

[12] *See, e.g., Sovereign Immunity Decisions, supra*, at 1054 (excerpting State Department letter in *Kendall v. Kingdom of Saudi Arabia*, 65 Adm. 885 (S.D.N.Y. 1965)) ("King Faisal Bin Adull Aziz Al-Saud is the Head of State of The Kingdom of Saudi Arabia and as Head of State is not subject to the jurisdiction of any foreign Court without his consent."); *Lafontant*, 844 F. Supp. at 131-32 ("A head-of-state recognized by the United States government is absolutely immune from personal jurisdiction in United States courts unless that immunity has been waived by statute or by the foreign government recognized by the United States.").

case, the Court found that a sitting foreign minister was entitled to "full immunity" from the criminal jurisdiction of another state while in office. *Id.* at 22. Such immunity applied to acts performed in a private as well as a public capacity, *see id.*, and even to acts alleged to constitute war crimes and crimes against humanity. *See id.* at 24.

Extending the FSIA to foreign officials, by contrast, would make sitting heads of state prone to civil suits in U.S. courts on a variety of claims, including claims based on commercial activities, *see* 28 U.S.C. § 1605(a)(2), and noncommercial torts. *See id.* § 1605(a)(5). Abolishing the absolute immunity enjoyed by sitting heads of state would work a significant change in federal common law and place the United States in breach of customary international law. This Court has long held that "[t]he common law . . . ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose." *Fairfax's Devisee v. Hunter's Lessee,* 11 U.S. (7 Cranch) 603, 623 (1812). Moreover, "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. The Schooner Charming Betsy,* 6 U.S. (2 Cranch) 64, 118 (1804). The language of the FSIA does not apply clearly enough to foreign officials to overcome these presumptions. To the contrary, as explained above in Part II, the plain language of the Act indicates that Congress did not intend to displace the common law immunities of foreign officials.

Petitioner might avoid this result by conceding that Congress did not intend to reach sitting heads of state, but that concession would be at odds with

his contention that the FSIA comprehensively codified common law immunities. In any event, since there is no textual basis for distinguishing heads of state from other foreign officials, petitioner's argument would require the courts to create a non-textual exception for foreign heads of state in order to avoid substantial changes in the common law and a violation of customary international law.

D. Extending the FSIA to Foreign Officials Would Abolish Any Common Law Immunities of Former Officials

The precise scope of the immunities enjoyed by former officials under federal common law and under international law is not clear and is not before this Court. To the extent such immunities exist, however, applying the FSIA to foreign officials would remove them. This Court has repeatedly held that immunity under the FSIA depends not on the defendant's status at the time of the conduct but on the defendant's status at the time of the suit. *See Altmann,* 541 U.S. at 696; *Dole Food*, 538 U.S. at 478-79. As Justice Breyer explained, concurring in *Altmann*, "the legal concept of sovereign immunity, as traditionally applied, is about a defendant's *status* at the time of suit, not about a defendant's *conduct* before the suit." 541 U.S. at 708 (Breyer, J., concurring).

In *Dole Food*, this Court unanimously rejected the argument that the FSIA should be administered like domestic official immunities "that are based on the status of an officer at the time of the conduct giving rise to the suit." 538 U.S. at 478-79. The Court explained:

> Foreign sovereign immunity, by contrast, is not meant to avoid chilling foreign states or their instrumentalities in the conduct of their business but to give foreign states and their instrumentalities some protection from the inconvenience of suit as a gesture of comity between the United States and other sovereigns.

Id. at 479. Petitioner asks this Court to adopt an argument that it expressly and unanimously rejected in *Dole Food.*

Contrary to petitioner's suggestion, *see* Pet. Br. 47-52, *Altmann* and *Dole Food* cannot be limited to suits against agencies and instrumentalities. *Dole Food* did not simply construe the word "is" in § 1603(b). It also noted "the longstanding principle that the jurisdiction of the Court depends upon the state of things at the time of the action brought," 538 U.S. at 478 (quotations omitted), a principle it deemed to apply to § 1603(a)'s definition of "foreign state" as incorporated in both 28 U.S.C. § 1332(a)(4) and § 1441(d).[13]

In describing the purpose of foreign sovereign immunity—and distinguishing the purpose of official immunities—*Dole Food* did not limit itself to the "agency or instrumentality" prong of § 1603(b) but

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[13] The Court wrote: "The Dead Sea Companies do not dispute that the time suit is filed is determinative under § 1332(a)(4), which provides for suits between 'a foreign state, defined in section 1603(a) . . . , as plaintiff and citizens of a State or of different States.' It would be anomalous to read § 1441(d)'s words, 'foreign state as defined in section 1603(a),' differently." 538 U.S. at 478.

expressly referred to both "foreign states and their instrumentalities." 538 U.S. at 479. Finally, *Altmann*, which reaffirmed that "the principal purpose of foreign sovereign immunity has never been to permit foreign states and their instrumentalities to shape their conduct in reliance on the promise of future immunity from suit in United States courts" but rather to reflect "current political realities and relationships," 541 U.S. at 696, involved a suit not just against an agency or instrumentality of a foreign state but against the foreign state itself. *See id.* at 681 (describing the defendants as "the Republic of Austria and the Austrian Gallery . . . , an instrumentality of the Republic").

In sum, this Court has consistently construed immunity under the FSIA to turn on the defendant's status at the time of suit. If foreign officials are deemed "foreign states" for the purposes of the Act, any immunity they might have—even for acts unquestionably within their official capacities—would vanish once they left office.

E. Extending the FSIA to Foreign Officials Acting in an Official Capacity Would Require This Court to Create a Non-Textual Definition of Official Acts

Recognizing that it would create absurd results if foreign officials were always considered foreign states, petitioner contends that foreign officials are covered by the FSIA only when they act in an official capacity. Pet. Br. 21. Because Congress did not expect the FSIA to be applied to foreign officials, it is

not surprising that the text of the Act contains no definition of this concept.[14]

The determination of whether a suit is based on an official act might turn on a variety of factors including the nature of the act, the lawfulness of the act under foreign and international law, the views of the foreign government, and the views of the Department of State. Those questions were not decided by the district court or the court of appeals and are not before this Court. For present purposes, the critical point is that applying the FSIA to foreign officials will do nothing to help the courts answer those questions.

Petitioner asks this Court to depart from the text of the FSIA not once but twice. He first asks this Court to apply the FSIA to foreign officials despite their omission from the text of the statute. He then asks this Court to create an exception for acts that were not performed in an official capacity, again without any basis in the text. And in the end, all petitioner hopes to achieve is to render foreign

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[14] The FSIA mentions the concept of official capacity only in the context of attributing certain conduct of foreign officials and employees to the state. *See* 28 U.S.C. § 1605(a)(5) (exception for noncommercial torts "caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment"); *id.* § 1605A(a)(1) (exception for terrorism "engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency"). As discussed above in Part II, the separate treatment of foreign officials in these provisions supports the proposition that foreign officials are not "foreign states."

officials immune from suit under the FSIA to the same extent as under pre-existing common law. It would be much simpler to hold that the FSIA does not apply to foreign officials, leaving those immunities to be governed by federal common law.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Dated: January 26, 2010

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APPENDIX

APPENDIX A

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AMICUS CURIAE BRIEF

No. 08-1555

In The Supreme Court of the United States

MOHAMED ALI SAMANTAR,

Petitioner,

v.

BASHE ABDI YOUSUF, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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INTEREST OF THE *AMICI CURIAE*

Amici curiae are professors with expertise in public international law and comparative law who have an interest in the proper understanding of the legal authorities bearing on the potential immunities of former foreign officials who are otherwise subject to the jurisdiction of U.S. courts.[1] Petitioner and his *amici* have filed briefs in this case that misconstrue such authorities and rely on them for the overly broad proposition that current and former foreign officials enjoy absolute immunity from suit under the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1330, 1602-1606, 1608, and as a matter of international law.

This Court should not address non-FSIA sources of immunity in the first instance.[2] There is no need to

---

[1] This brief is filed with the written consent of the parties, which has been lodged with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] As Justice Kennedy wrote for himself, the Chief Justice, and Justice Thomas in *Republic of Austria v. Altmann*, this Court "need not, and ought not, resolve the question [of pre-FSIA immunity] in the first instance. Neither the District Court nor the Court of Appeals has yet addressed it. The issue is complex and would benefit from more specific briefing, arguments, and consideration of the international law sources bearing upon the scope of [non-FSIA] immunity." *Republic of Austria v. Altmann*,

(Continued on following page)

address these authorities in order to find, as the Fourth Circuit properly did, that the FSIA does not apply in this case. However, because Petitioner and his *amici* have relied on certain non-FSIA authorities, we respectfully submit this brief in order to provide the Court with what is, in our view, a more accurate and faithful account of their meaning, and to call other, more relevant cases to the Court's attention.

David J. Bederman is the K.H. Gyr Professor of Private International Law at Emory University.[3] He has been a member of the Board of Editors of the American Journal of International Law since 1999. From 1998 to 2002 he served as a member of an American Bar Association Working Group on the Foreign Sovereign Immunities Act, the report of which appeared at 40 Colum. J. Transnat'l L. 489, 535-43 (2002) (for an analysis of the FSIA's application to foreign officials), and 30 Int'l Lawyer 1261 (2002), and which has been previously relied upon by members of this Court. *See Dole Food Co. v. Patrickson*, 538 U.S. 468, 484-86 (2003) (Breyer, J., dissenting).

Frederic L. Kirgis is the Law Alumni Association Professor of Law, Emeritus, at Washington

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541 U.S. 677, 728 (2004) (Kennedy, J., dissenting). The same is true here.

[3] Institutional affiliations are provided for identification only.

and Lee University School of Law. He served as Vice-President of the American Society of International Law from 1985-1987 and was on the Board of Editors of the American Journal of International Law from 1984-1996 and 1998-2003. He currently serves on the American Society of International Law Executive Committee and is a member of the American Law Institute.

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International Association of Penal Law and the International Law Association.

SUMMARY OF ARGUMENT

Petitioner makes two unsupported assertions. First, Petitioner asserts that "pre-1976 common law immunized a state's officials for their official acts." Pet. Br. at 17. He relies heavily on this assertion for his conclusion that the FSIA should be read to include former foreign officials notwithstanding the FSIA's omission of any reference to individuals in its definition of the term "foreign state." *See* 28 U.S.C. § 1603(a). Second, Petitioner claims that "the overwhelming *current* international authority" provides immunity to former foreign officials sued in their personal capacity for acts of torture and extrajudicial killing. *Id.* at 19. The authorities Petitioner cites, and significant authorities that he omits to cite, do not support these assertions.

Simply put, non-FSIA sources of foreign official immunity do not provide a blanket shield from personal liability for universally recognized international law violations, even if such violations were committed by individuals who held government positions. Because non-FSIA immunities derive from a variety of legal sources, it is not possible to reduce them to a single category. Sources of immunity outside the FSIA include international treaties providing certain immunities for accredited diplomats and consuls. They

also include customary international law, which may be incorporated as federal common law, providing limited immunities such as that afforded sitting heads of state. Additionally, some courts have recognized certain immunities for foreign officials who were not diplomats, consuls, or sitting heads of state, but they have done so inconsistently, usually in the contexts of suits in which the state is either the real party in interest or a necessary party.

These scattered authorities do not support Petitioner's sweeping conclusion that pre-1976 common law and current international law so uniformly require granting blanket immunity to former foreign officials for their ostensibly official acts that this Court should read a similar intent into the FSIA's non-hospitable text. Moreover, none of the specialized pockets of immunities recognized under pre-FSIA common law or current international law applies to Petitioner.

ARGUMENT

The cases on which Petitioner relies do not support the blanket immunity he claims. Instead, they support much narrower, specialized immunities, none of which applies to Petitioner. Although this Court need not and should not pronounce on the scope of any immunities that might exist outside the FSIA in the first instance, any such immunities would not, in any event, benefit Petitioner.

I. Pre-FSIA U.S. Case Law Does Not Support Blanket Immunity

Contrary to Petitioner's claim, Pet. Br. 17, pre-1976 common law did not recognize blanket immunity for foreign officials for acts performed on behalf of the state.

A. Eighteenth And Nineteenth Century Cases Denied Blanket Immunity For Government Officials

Most immunity cases from the eighteenth and nineteenth centuries involved ships, not individuals. *See, e.g., The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812) (involving a dispute about whether a ship was a French public vessel or the U.S. plaintiff's private property). The few cases that involved individuals did not find blanket immunity.

Petitioner cites a 1797 opinion by Attorney General Charles Lee indicating that "a person acting under a commission from a foreign sovereign is not amenable for what he does in pursuance of his commission" to any U.S. court. 1 Op. Att'y Gen. 81 (1797), *cited in* Pet. Br. 27. Petitioner fails to mention that Lee specifically affirmed in the same opinion that the controversy between the plaintiffs and the defendant "is entitled to a trial according to law," and that Lee declined to intervene in the case. 1 Op. Att'y Gen. 81 at *2. Lee's position appears to have been that the claim of official authority could be a defense on the merits, not an immunity from suit.

Petitioner also fails to mention a 1794 opinion by Attorney General William Bradford, cited in Lee's opinion, in which the Executive similarly declined to intervene in pending litigation against a former foreign official. In that case, Bradford opined that Victor Collot, the late Governor of the French colony of Guadeloupe, should not be obliged to give bail, but that the former Governor would nevertheless have to "defend himself by such means as his counsel shall advise." 1 Op. Att'y Gen. 45 at *2 (1794). The Supreme Court of Pennsylvania found that the defendant properly could be held to bail, whether or not he would ultimately be found liable. *Waters v. Collot*, 2 U.S. (2 Dall.) 247, 248 (1796).

In the important case of *People v. McLeod*, 25 Wend. *483 (N.Y. Sup. Ct. 1841), which Petitioner does not discuss or cite, the highest court of general jurisdiction sitting in New York at that time *rejected* the defendant's claim to immunity. Alexander McLeod, a British subject and former deputy sheriff of the Niagara District in Upper Canada, faced criminal and civil charges in a New York court for his alleged involvement in the 1837 attack on the steamboat *Caroline*. The British Ambassador to the United States, Henry Fox, claimed that McLeod should be entitled to immunity because the attack "was a public act of persons in her majesty's service, obeying the order of their superior authorities." Letter from Mr.

Fox to Mr. Forsyth (Dec. 13, 1840).[4] Secretary of State John Forsyth replied that the circumstances would not justify intervention by the U.S. government, even if the government could intervene (which he doubted):

> The president is not aware of any principle of international law, or, indeed, of reason or justice, which entitles such offenders to impunity before the legal tribunals, when coming voluntarily within their independent and undoubted jurisdiction, because they acted in obedience to their superior authorities, or because their acts have become the subject of diplomatic discussion between the two governments.

Letter from Mr. Forsyth to Mr. Fox (Dec. 26, 1840).[5] A unanimous three-judge panel of the New York Supreme Court of Judicature, which included future U.S. Supreme Court Justice Samuel Nelson,[6] denied McLeod's claim of immunity.

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[4] All cited correspondence is reprinted in the *McLeod* opinion.

[5] Secretary of State Daniel Webster, who was appointed when President Martin Van Buren replaced William Henry Harrison, would have given more weight to McLeod's "superior orders" defense, but he also disclaimed any power to intervene. Letter from Mr. Webster to Mr. Fox (Apr. 24, 1841).

[6] *See* David J. Bederman, *The Cautionary Tale of Alexander McLeod: Superior Orders and the American Writ of Habeas Corpus*, 41 Emory L.J. 515, 523 (1992), *citing* 5 Carl Swisher, *History of the Supreme Court of the United States: The Taney Period 1836-64*, at 186 (1974).

Petitioner cites two additional cases from this period, but these cases both involved the Act of State doctrine, not jurisdictional immunity. Pet. Br. 32 n.3, *citing Underhill v. Hernandez*, 168 U.S. 250 (1897) (upholding a directed verdict for defendant who allegedly requisitioned plaintiff's water works during a military occupation, after the case was tried on the merits); *Hatch v. Baez*, 14 N.Y. Sup. Ct. 596, 600 (N.Y. Sup. Ct. 1876) (holding that acts of a "foreign and friendly" government taken within its own territory should not be subject to adjudication in U.S. courts). Petitioner cannot bootstrap cases on the prudential Act of State doctrine, which is a defense on the merits, to support his blanket claim to immunity from jurisdiction.[7]

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[7] This Court has emphasized that the prudential Act of State doctrine is separate and distinct from the jurisdictional doctrine of sovereign immunity. *See, e.g., Republic of Austria v. Altmann*, 541 U.S. 677, 700 (2004) (stating that "[u]nlike a claim of sovereign immunity, which merely raises a jurisdictional defense, the act of state doctrine provides foreign states with a substantive defense on the merits"); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 438 (1964) (distinguishing between act of state doctrine and foreign sovereign immunity). Cases applying the Act of State doctrine have established that universally condemned human rights violations are not "acts of state." *See, e.g., Ochoa Lizarbe v. Rivera Rondon*, 642 F. Supp. 2d 473, 488 (D. Md. 2009) (finding that alleged acts of torture, extrajudicial killing, and crimes against humanity by a former Lieutenant in the Peruvian army "are not deemed official acts for the purposes of the acts of state doctrine"); *Trajano v. Marcos*, 978 F.2d 493, 498 n.10 (9th Cir. 1992) (restating earlier holding that claims of torture and summary execution against President Ferdinand Marcos are not "nonjusticiable 'acts of state'"); *Jimenez v.*

(Continued on following page)

These early cases do not provide any basis for inventing the blanket immunity that Petitioner claims existed prior to the enactment of the FSIA.

B. Twentieth-Century Decisions Did Not Recognize Blanket Immunity And None Found Immunity For Claims Such As Those At Issue Here

The more recent cases Petitioner cites do not support his sweeping claim that U.S. courts "routinely held that officials acting in their official capacities were entitled to immunity derived from that of the state itself" before 1976. Pet. Br. 27. To the contrary, courts did not uniformly find immunity, and no court found immunity in circumstances resembling those at issue here.

The pre-FSIA, twentieth-century cases Petitioner cites involved the specialized context of suits in property and contract. *See, e.g., Oetjen v. Central Leather Company*, 246 U.S. 297 (1918) (affirming the dismissal

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Aristeguieta, 311 F.2d 547, 557-58 (5th Cir. 1962) (rejecting Act of State defense to extradition of former President of Venezuela for offense of "embezzlement or criminal malversation by public officers"); S. Rep. No. 249, 102d Cong., 1st Sess. 8 (1991) (indicating that the Act of State doctrine "cannot shield former officials from liability" under the TVPA); *cf. Liu v. Republic of China*, 892 F.2d 1419, 1432-33 (9th Cir. 1989) (denying application of Act of State doctrine because the foreign state was not acting in the public interest, there was a large degree of international consensus prohibiting the activity, and the act occurred in the United States).

of two suits in replevin involving the title to hides confiscated and sold by Mexican revolutionary forces in the occupied city of Torreon). Although the "restrictive" theory of sovereign immunity emerged during this period to justify subjecting foreign states themselves to U.S. jurisdiction for their commercial activities, individual officials were sometimes – but not always – afforded immunity in connection with these commercial activities.

Federal and state courts granted immunity to individual government officials in three cases from the 1970s involving commercial transactions. *See Greenspan v. Crosbie*, 1976 U.S. Dist. LEXIS 12155, Fed. Sec. L. Rep. (CCH) P95, 780 (S.D.N.Y. Nov. 23, 1976), *reported in* 1977 Dig. U.S. Prac. Int'l L. 1017, 1076 (No. 62) (indicating that the State Department issued a Suggestion of Immunity for the three individual defendants, who included the current Premier of Newfoundland, for alleged violations of §10b of the Securities Exchange Act of 1934); *Heaney v. Government of Spain*, 445 F.2d 501, 503-04 (2d Cir. 1971) (determining, in an action against the Government of Spain and its current Consul General for the alleged non-payment of fees due under a contract, that the contract was not enforceable by a U.S. court because it concerned diplomatic activity); *Oliner v. Can. Pac. Ry. Co.*, 311 N.Y.S.2d 429, 434 (N.Y. App. Div. 1970) (finding that the current Custodian of the Department of the Secretary of State of Canada could not be brought within the court's jurisdiction in a suit involving the ownership of shares of capital stock

issued by a Canadian corporation). It is in this specialized context that a Texas court had previously found that a claim for breach of contract against an individual official was really a suit against the foreign government itself. *See Bradford v. Dir. Gen. of R.R.s of Mex.*, 278 S.W. 251 (Tex. Civ. App. 1925) (finding that a suit for breach of contract to paint railroad bridges against a current "agent of the Mexican government in the management of its railroad" was really a suit against the Mexican government). *Bradford* illustrates circumstances in which "the effect of exercising jurisdiction [over the individual defendant] would be to enforce a rule of law against the state." Restatement (Second) of the Foreign Relations Law of the United States, § 66(f) (1965).

Importantly, not all courts during this period found immunity for individual officials, even when the claims in suit involved actions taken by those individuals in their capacities as agents of a foreign state. *See Pilger v. United States Steel Corp. and Public Trustee*, 98 N.J. Eq. 665 (N.J. Ct. App. 1925) (determining that a German citizen could sue a British public trustee for allegedly unlawfully seizing stock certificates belonging to the plaintiff from a London bank); *Lyders v. Lund*, 32 F.2d 308, 309 (N.D. Cal. 1929) (where plaintiff sought an accounting by the consul of Denmark, a decree for the balance due, and the sale of assets to satisfy plaintiff's claim, observing that the acts of foreign officials should be treated as acts of the foreign state if "the foreign state will have to respond directly or indirectly in the event of a

judgment," and declining to find immunity in the instant case); Sovereign Immunity Decisions of the Department of State from May 1952 to January 1977 (M. Sandler, D. Vagts, & B. Ristau, eds.), *in* 1977 Dig. U.S. Prac. Int'l L. 1017, 1062-63 (No. 62) (reporting that, in *Cole v. Heitman* (S.D.N.Y. 1968), the State Department declined to suggest immunity for the British West Indies Central Labor Organization *or* its liaison officer, despite the Jamaican ambassador's representation that the organization was "an official agency and arm of the Government acting without profit to itself in the conduct of public acts"). Petitioner fails to cite either *Pilger* or *Lyders*, and he fails to mention that *Cole* denied immunity for alleged civil rights violations including false arrest and imprisonment, which the State Department deemed "private" activities in the circumstances under the 1952 Tate Letter standard. 1977 Dig. U.S. Prac. Int'l L. 1017 at 1063.

In sum, pre-FSIA cases do not support Petitioner's sweeping claim to blanket immunity for foreign officials. The cases did not uniformly find immunity, and no case found immunity from jurisdiction in circumstances remotely resembling those at issue here.

II. Current International Law Does Not Support Blanket Immunity

Petitioner's claim that "the overwhelming *current* international authority," Pet. Br. 19, provides

immunity to former foreign officials sued in their personal capacity for acts of torture and extrajudicial killing is simply incorrect.[8] Petitioner cites a Reporter's Note to § 464 of the Restatement (Third) of Foreign Relations Law of the United States (1987), which states that "[o]rdinarily" the acts of foreign officials "are not within the jurisdiction to prescribe of other states." Pet. Br. 38. He relies on this for the proposition that former foreign officials should therefore be immune from suit. *Id.* But jurisdiction to prescribe (as opposed to jurisdiction to adjudicate) is not at issue here. The very comment Petitioner cites indicates, in a sentence he does not quote: "However, a former head of state appears to have no immunity from jurisdiction to adjudicate." Rest. (3d) of For. Rel.

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[8] Petitioner also conspicuously ignores the well established *lack* of immunity from criminal proceedings for former foreign officials under international law, which even his *amici* acknowledge. *See Amicus Curiae* Brief of the American Jewish Congress in Support of Petitioner at 5, 7-8, and 43 (emphasizing that there is no immunity from prosecution "in any court of a state empowered to exercise universal criminal jurisdiction"); Brief of *Amici Curiae* Former Attorneys General of the United States in Support of Petitioner at 17 (assuming incorrectly that a lack of immunity from criminal prosecution can coexist with blanket immunity from civil suit under the FSIA or as a matter of international law); *cf.* Brief for *Amicus Curiae* the Anti-Defamation League, Supporting Neither Side at 6 (indicating that "When individuals acting under color of law perpetrate such atrocities, they can and should be held criminally responsible regardless of rank or title"). *See also infra* n.14 (indicating that there is no legal basis for drawing a sharp distinction for immunity purposes between civil proceedings for torture and criminal proceedings for the same conduct).

§ 464 n.14. Petitioner's other foreign and international law citations are similarly misguided.

Under international law, the immunities of foreign officials are governed by a combination of treaties and customary international law principles, not all of which have been codified in domestic statutes. Some officials, notably current diplomats, sitting heads of state, and a narrow class of current high-level officials such as incumbent foreign ministers, may benefit from status-based immunity (immunity *ratione personae*). Some others, whether currently in office or not, may invoke certain forms of conduct-based immunity (immunity *ratione materiae*). Although some foreign courts have recognized certain immunities for foreign officials who were not diplomats, consuls, or sitting heads of state, they have done so inconsistently, usually in the contexts of suits in which the state is either the real party in interest or a necessary party.

Because these cases have been relatively few and far between, it is difficult to draw meaningful generalizations from them, let alone infer a rule of customary international law, which would require a showing of consistent state practice accompanied by *opinio juris*. Moreover, none of the specialized immunities found by these few cases would shield Petitioner from suit.

A. Former Officials Cannot Claim Status-Based Immunity

The two recognized forms of status-based immunity are diplomatic immunity and head of state immunity. Former officials cannot claim status-based immunity under international law.

Diplomatic immunity is solely intended to enable diplomats to perform their missions free from interference by the receiving state. Today, diplomatic immunity is governed primarily by the Vienna Convention on Diplomatic Relations. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 96 (entered into force with respect to the United States on December 13, 1972); *see also* Diplomatic Relations Act of 1978, 22 U.S.C. §§ 254a-254e.[9] Under the Vienna Convention, foreign diplomatic agents accredited by a receiving state enjoy status-based immunity from criminal and most civil proceedings during their appointment, *see* Art. 31(1), although such immunity may be waived by the sending state. *See* Art. 32.

The State Department has the exclusive authority to accredit diplomats. The State Department may also suggest status-based immunity from service of

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[9] In the United States, status-based diplomatic immunity also extends to certain accredited members of U.N. Missions, who may be treated as diplomats. *See* Section 15 of the Headquarters Agreement between the United States and the United Nations, 22 U.S.C. § 287.

process for members of special diplomatic missions. *See, e.g.*, Suggestion of Immunity and Statement of Interest of the United States, *Li Weixun v. Bo Xilai*, Civ. No. 04-0649 (D.D.C. July 24, 2006) at *11 n.9 (suggesting immunity from service of process for invitee of the Executive branch but emphasizing that "[s]pecial mission immunity would not . . . encompass all foreign official travel").[10]

The International Court of Justice has recognized the status-based immunity of an *incumbent* foreign minister under the principle that sitting heads of state are entitled to immunity from the legal process of foreign courts. *See* Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), Judgment, I.C.J. Reports 2002, at 3 (Feb. 14, 2002). U.S. courts have also recognized the status-based immunity of sitting heads of state. *See, e.g.*, *Ye v. Zemin*, 383 F.3d 620 (7th Cir. 2004) (rejecting application of FSIA to President of China but finding him immune from service of process as sitting

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[10] In contrast to accredited diplomats, consular officials do not enjoy status-based immunity, and are instead protected by conduct-based immunity under the Vienna Convention on Consular Relations, for acts performed in the exercise of their consular functions. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. By the express terms of the applicable treaties, former diplomats and consuls continue to enjoy limited conduct-based immunity after they leave office for acts specifically performed in the exercise of their diplomatic or consular functions. Vienna Convention on Diplomatic Relations, Art. 39(2); Vienna Convention on Consular Relations, Art. 53(4).

head of state); *Lafontant v. Aristide*, 844 F. Supp. 128 (E.D.N.Y. 1994) (finding elected President of Haiti immune from suit as sitting head of state, even in exile).

By definition, status-based immunities only apply during a diplomat's or head of state's tenure in office. *See* Arrest Warrant Case at 25-26 (emphasizing that absolute immunity ends once a foreign minister leaves office); *see also* Notice of Changed Circumstances Submitted by the United States of America, *Mumtaz v. Ershad*, No. 74258/89 (N.Y. Sup. Ct. March 1991) (withdrawing previous suggestion of immunity in light of defendant's resignation as President of Bangladesh). Because former foreign officials such as Petitioner are private individuals who no longer represent their respective governments, they cannot claim status-based immunity from the jurisdiction of U.S. courts.

B. The Handful Of Foreign Cases That Have Found Immunity For Individual Officials All Involved Specialized Circumstances, And Do Not Support Blanket Immunity

The foreign and international cases cited by Petitioner do not in any way support his assertion that "[n]ow, as in 1976, courts around the world recognize that officials are entitled to sovereign immunity in civil suits challenging their official-capacity acts." Pet. Br. 36. It is true that several foreign courts have declined to find individual officials personally liable

for engaging in certain transactions purely on behalf of a foreign state. However, all of the cases that Petitioner cites can be distinguished from the claims at issue here. Contrary to Petitioner's assertion, Pet. Br. 36, no "reciprocity" concerns require inventing a category of immunity that has not been recognized consistently by courts in other countries.[11]

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[11] Citations by one of Petitioner's *amici* to cases involving the immunity of states themselves are not germane to the analysis here, because such immunity is clearly governed in the United States by the FSIA. *See Bouzari v. Islamic Republic of Iran*, [2004] 71 O.R. (3d) 675 (Ont. Ct. App.) (Can.) (in a case brought directly against the state of Iran, finding that Iran was entitled to immunity under the Canadian SIA, because torture is not a commercial act); *Kalogeropoulou et al. v. Greece & Germany*, App. No. 59021/00 (Eur. Ct. H.R. Dec. 12, 2002) (admissibility) (finding that Greece had not violated the applicants' right of access to court by allowing Germany to invoke state immunity as a defense to civil enforcement proceedings in Greece); *Al-Adsani v. Government of Kuwait, reprinted in* (1996) 107 I.L.R. 536 (Ct. App.) (U.K.) (finding no exception under the U.K. SIA for damages claim for alleged acts of torture brought directly against the Government of Kuwait); *Saudi Arabia v. Nelson*, 507 U.S. 349, 362 (1993) (in the context of a claim brought directly against the state of Saudi Arabia, stating that "[e]xercise of the powers of police and penal officers is not the sort of action by which private parties can engage *in commerce*" under the FSIA) (emphasis added). Moreover, some foreign courts have denied immunity for states *and* for individual co-defendants. *See, e.g., Ferrini v. Republica federale di Germania*, Cass., sez. un., 11 marzo 2004, n.5044, 87 Rivista di Diritto Internazionale 539 (2004) (English translation available at 128 I.L.R. 658 (2004)) (ordering Germany to pay damages to an Italian abducted by the German army in 1944 and deported to Germany to work as a forced laborer); *Al-Adsani v. Government of Kuwait* (Jan. 21, 1994) (Ct. App. Jan. 21, 1994) (U.K.)

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i. Courts Have Not Found Immunity Where Only The Assets Of The Individual Are At Issue, Although Some Courts Have Found Immunity Where A Judgment Would Involve The Assets Of The Foreign State

Petitioner cites several cases involving the assets of foreign states. Pet. Br. 28-29, 32. However, the assets of a foreign state are not at issue here. Of utmost relevance here, where only the assets of the individual but not the state are at issue, foreign courts have not granted immunity. *See Saorstat and Continental Steamship Co. v. Rafael de las Morenas*, [1945] I.R. 291, *reprinted in* 12 I.L.R. 97, 98 (S.C.) (Ir.) (finding that a colonel in the Spanish army who had contracted to carry horses from Dublin to Lisbon for use by the Spanish army was not entitled to immunity because "[h]e is sued in his personal capacity and the judgment which has been, or any judgment which may hereafter be, obtained against him will bind merely the appellant personally, and any such judgment cannot be enforced against any property save that of the appellant").[12]

(referencing but not reviewing the High Court's conclusion that the three *individual* defendants were *not* immune from service of process outside the jurisdiction).

[12] According to the Irish Supreme Court in *Saorstat*, the possibility that the Spanish Government might indemnify the colonel, whether voluntarily or compulsorily, did not turn the suit into one against the Government. *Id.* at 99. Justice O'Byrne

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On the other hand, when a suit nominally brought against an individual official would in fact involve adjudicating ownership of a foreign state's assets or granting a damages remedy directly against the treasury of a foreign state, some courts have found immunity. For example, in *Duke of Brunswick v. King of Hanover*, (1848) 9 E.R. 993 (H.L.) (U.K.), which provides the foundation for much of the subsequent jurisprudence, the House of Lords refused to

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wrote for the court: "Where the Sovereign is not named as a party and where there is no claim against him for damages or otherwise, and where no relief is sought against his person or his property, [the Sovereign cannot] be said to be impleaded either directly or indirectly." *Id.* at 101. One foreign intermediate appellate court has taken a broader view of the role of potential indemnification in a case involving a prosecutor's decision to file criminal charges. *See Jaffe v. Miller*, [1993] 64 O.A.C. 20, 33 (Can.) (finding that the defendants, who included the Attorney General of Florida, were "functionaries" acting "within the scope of [their] duties and in furtherance of a public act" when they filed criminal charges that led to the plaintiff's conviction in Florida, and that these defendants could claim immunity because "[i]n the event that the plaintiff recovered judgment, the foreign state would have to respond to it by indemnifying [them]"). The *Jaffe* court emphasized that its ruling was limited to the facts of the cases before it, noting that both the person sued and the function performed must be considered, and that "[i]t will be a matter of fact for the court to decide in each case whether any given person performing a particular function is a functionary of the foreign state" for immunity purposes. *Id.* at 34-35. There is certainly no broad consensus or settled law in favor of immunity that would warrant judicially imputing immunity into the FSIA's text, the terms of which provide no framework for individual immunity analysis or resolution of the role of indemnification.

inquire into the legality of the appointment of a guardian for the management of the Duke of Brunswick's property, under the laws of Brunswick and Hanover. Lord Lyndhurst, who agreed with the court's disposition, affirmed that "[other] circumstances may exist in which a foreign Sovereign may be sued in this country for acts done abroad." *Id.* at 1001. Other cases, relying on a similar principle, all involved claims for which the foreign state was a necessary party or otherwise the real party in interest. *See Grunfeld v. United States*, (1968) 3 N.S.W.R. 36 (Austl.) (finding the Commanding Officer of the U.S. Rest and Recuperation Office in Sydney immune from claims arising from the termination of a contract to obtain civilian clothing for hire on behalf of the office); *Rahimtoola v. Nizam of Hyderabad*, [1958] A.C. 379 (H.L.) (U.K.) (finding a suit that named the former High Commissioner of Pakistan as a defendant barred by sovereign immunity because it involved determining Pakistan's entitlement to funds held in a London bank account); *Johnson v. Turner*, G.R. No. L-6118 (S.C. Apr. 26, 1954) (Phil.) (finding U.S. officers immune from suit by a U.S. citizen for the dollar value of military payment certificates (scrip money) because the claim and judgment would be "a charge against and a financial liability to the U.S. Government"); *Syquia v. Almeda Lopez*, G.R. No. L-1648, 84 Phil. Rep. 312 (S.C. Aug. 17, 1949) (finding that the United States was the real party in interest in a claim for back rents owed by the U.S. military for the lease of civilian apartment buildings in which U.S. army officers were billeted and quartered); *Compania*

Naviera Vascongada v. Steamship Cristina, [1938] A.C. 485 (H.L. 1938) (U.K.) (specifying, in a judgment by Lord Atkin, that courts will not seek "specific property or damages" from a foreign sovereign, and will not "seize or detain property which is his, or of which he is in possession or control"); *Twycross v. Dreyfus*, (1877) 5 Ch.D. 605 (Ct. App.) (U.K.) (finding lack of jurisdiction over plaintiffs' claim to the proceeds of the sale of guano owned by the Republic of Peru because the Republic was a necessary party as the owner of the guano).

Because Respondents are not attempting to recover damages from Somalia or to adjudicate the title to Somali assets, but instead sue Petitioner in his "personal capacity," *Saorstat*, 12 I.L.R. at 98, the rationale of these foreign cases does not support immunity for him.

ii. One Court Found Immunity For A *Current* Official From An Injunction Involving A Document Request, But This Does Not Support Blanket Immunity For A *Former* Official For Torture And Extrajudicial Killing

Petitioner relies on the *Church of Scientology Case*, *reprinted in* 65 I.L.R. 193 (BGH 1978) (F.R.G.), for the proposition that suing individual officials automatically undermines the sovereignty of the state. Pet. Br. 37. This single case cannot support such a sweeping claim. In *Church of Scientology*, the

plaintiff sought an injunction against the *current* head of New Scotland Yard to prevent him from complying with a document request from Germany to the United Kingdom under their 1961 Agreement on Mutual Assistance in Criminal Matters. Because the United Kingdom had a treaty obligation to comply with Germany's request, the German Supreme Court reasoned that the U.K. official's act of complying with the request "can *only* be attributed to the British State and not to him or any other official acting on behalf of the State, because the State is always to be considered the actor when one of its functionaries performs acts which are *incumbent* on it." *Id.* at 195 (emphasis added). This reasoning relates to the state's "sovereign activity" of complying with international law – not (as in Petitioner's case) violating it. It would turn *Church of Scientology* on its head to find that its holding as to compliance with international law obligations is relevant to a claim arising out of the breach of the international prohibitions against torture and extrajudicial killing.[13]

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[13] Analogously, an international tribunal found that a current individual official was immune from service of a subpoena because *only* the state, not the individual, would be subject to sanction for non-compliance. *See Prosecutor v. Blaskic*, *reprinted in* 110 I.L.R. 607 (ICTY 1997) (finding that the ICTY does not have the legal authority to seek documents under ICTY Statute Article 29(2) by issuing subpoenas to current government officials in their official capacity, because the ICTY is not empowered to impose sanctions on states in the event of non-compliance). The decision in *Blaskic* does not affect the scope of conduct-based immunity for former officials from the jurisdiction

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iii. Several Additional Cases Found Immunity For Current Officials In Specialized Circumstances That Do Not Apply To Petitioner

A few foreign courts have found immunity for *current* officials in a handful of *sui generis* contexts, including the application of specialized domestic immunity statutes. These cases do not support Petitioner's assertion that *international law* requires granting blanket immunity to *former* officials.

One case found immunity for a current official because he was not even in office at the time the alleged acts occurred. In these circumstances, there was no basis for finding the official personally liable and no basis for bringing a suit against him in his personal capacity. *See Propend Finance Pty. Ltd. v. Sing*, *reprinted in* 111 I.L.R. 611, 662 (U.K. Ct. App. 1997) (finding no basis for suing the current Commissioner of the Australian Federal Police Force for an improper fax sent by an Australian diplomat, where the Commissioner in office at the time the fax

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of national courts, because it only deals with acts that "are not attributable to [the official] personally" *and* that can *only* be enforced against the state itself, such as the act of complying with a request to produce official documents. *Id.* at ¶ 38. As the ICTY emphasized in *Blaskic*, "those responsible for [war crimes, crimes against humanity, or genocide] cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity," just as spies "although acting as State organs, may be held personally accountable for their wrongdoing." *Id.* at ¶ 41.

was sent had died by the time of the suit). Going beyond these unique circumstances, the U.K. Court of Appeal opined that "[t]he protection afforded by the [U.K. State Immunity] Act of 1978 to States would be undermined if employees, officers (or as one authority puts it, 'functionaries') could be sued as individuals for matters of State conduct in respect of which the State they were serving had immunity." *Id.* at 669. This statement might be true on the limited facts of *Propend Finance* and as a matter of U.K. law, but not in this case. First, the "matter of state conduct" at issue in *Propend* was the ministerial act of faxing criminal evidence to an investigating authority, not torture and extrajudicial killing under color of foreign law. Second, as indicated below, the U.K. State Immunity Act contemplates immunity for individual officials, whereas the FSIA does not.

Another case found immunity under a specialized statute for the current Secretary of the European Commission of Human Rights in a suit alleging that he had presented an edited version of the plaintiff's claim, rather than the entire claim in plaintiff's own words, to the Commission. *See Zoernsch v. Waldock*, (1964) 2 All E.R. 256 (C.A.) (U.K.) (finding immunity for the current Secretary of the Commission under the Council of Europe (Immunities and Privileges) Order, 1960, and finding immunity for the former President of the Commission because his name was on a list of officials entitled to immunity compiled under the International Organisations (Immunities and Privileges) Act, 1950).

Two remaining cases similarly involved current officials who were sued for conduct that does not resemble the claims at issue here. *See Holland v. Lampen-Wolfe*, [2000] UKHL 40, (2000) 3 All E.R. 833 (H.L.) (U.K.) (finding a supervisor on a U.S. military base immune from claims for defamation for writing a negative report about U.S. citizen plaintiff's job performance on the base); *Schmidt v. The Home Secretary*, 103 I.L.R. 322 (1994) (H. Ct.) (Ir.) (finding immunity for current police commissioner and officer in a British extradition squad who allegedly lured plaintiff to the United Kingdom so that he could be arrested and extradited to Germany on drug trafficking charges). These two cases do not support the blanket immunity Petitioner claims he is owed as a matter of international law.

Petitioner is not a current official, and his alleged conduct does not fall within the reasoning of these few foreign cases. These cases do not in any way support blanket immunity for *former* foreign officials for torture and extrajudicial killing, much less demonstrate the even broader proposition that international law requires such immunity.

iv. The House Of Lords' Decision In *Jones*, Which Is The Subject Of A Pending Application To The European Court Of Human Rights, Does Not Apply Beyond The U.K. Context

The only case Petitioner cites from any court that involved the immunity of individual officials for claims of torture is *Jones v. Saudi Arabia*, [2007] 1 All E.R. 113 (H.L. 2006) (U.K.). The claimants in *Jones* have an application challenging this decision pending before the European Court of Human Rights. Applying the State Immunity Act 1978 (U.K.) (SIA), the House of Lords held that Saudi Arabia was immune from suit for torture and that its officials were entitled to the immunity of the state under the U.K. statute.

The immunity recognized by the House of Lords in *Jones* was founded not on customary international law but on § 1(1) of the SIA, which provides that "[a] State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of the Act." In contrast to the FSIA, the SIA defines a "State" to include at least some individuals, specifically heads of state. *See* SIA § 14(1)(a). Also unlike the FSIA, the SIA expressly excludes criminal proceedings, *see id.* § 16(4), suggesting that individual officials are covered by the SIA. Because the SIA did not expressly provide immunity for suits against officials, however, Lord Bingham of Cornhill looked to foreign and international authorities to determine whether individual officials

should be considered part of the "State" for purposes of the SIA. *See Jones* ¶¶ 10-12; *see also id.* ¶¶ 65-101 (Lord Hoffmann). Lord Bingham made clear that the source of the immunity he was applying was domestic law. "It is not suggested that the Act is in any relevant respect ambiguous or obscure," he said, and "the duty of the English court is therefore *to apply the plain terms of the domestic statute.*" *See id.* ¶ 13 (emphasis added).

Lord Bingham's other statements about customary international law in *Jones* were made in a context that renders them inapplicable to the United States and to this case. Specifically, the plaintiffs in *Jones* argued that Article 6 of the European Convention on Human Rights (providing *inter alia* for access to courts) required an exception to the immunity granted by the SIA in cases of torture. *See id.* ¶¶ 14-28. Because of the relationship between the European Convention and U.K. law, the burden was on the plaintiffs to show that international law required such an exception. *See id.* ¶ 14 ("the onus is clearly on [the claimants] to show that the ordinary approach to application of a current domestic statute should not be followed"). Lord Hoffmann also considered whether Article 6 of the European Convention required an implied exception to the immunity granted by the SIA and concluded that plaintiffs had failed to show that an exception was *required* by international law. *See id.* ¶¶ 39-64.

In the United States, the burden is obviously not on a plaintiff to show that an exception to state

immunity is required under Article 6 of the European Convention. Rather, the burden is on the defendant to show that a clear rule of immunity exists. With respect to sovereign immunity, this Court has long held that "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute" and that "[a]ll exceptions, therefore, . . . must be traced up to the consent of the nation itself. They can flow from no other legitimate source." *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 136 (1812).

The authorities relied upon by Lords Bingham and Hoffmann in *Jones* do not support the proposition that customary international law requires states to immunize foreign officials from civil suits alleging torture.[14] Lord Hoffmann relied heavily on the

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[14] There is also no basis in international law (as opposed to U.K. domestic law) for drawing a sharp distinction between civil proceedings for torture and criminal proceedings for the same conduct, from which there would be no immunity under the holding in *R. v. Bow Street Stipendiary Magistrate ex parte Pinochet Ugarte (No. 3.)*, [2000] 1 A.C. 147 (H.L.) (U.K.) (finding no immunity for former Chilean head of state for torture that occurred in Chile, where dual criminality requirement for extradition was satisfied). Multiple legal systems blend civil and criminal proceedings, meaning that a lack of immunity from criminal proceedings entails the possibility of civil damages. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 762-63 (2004) (Breyer, J., concurring in part and concurring in the judgment) (indicating that "the criminal courts of many nations combine civil and criminal proceedings"). Additionally, "[e]ven within common law systems, torts were historically considered the civil counterparts of crimes." *See* Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 Hastings L.J. 61, 83-84 (2008) (citing sources).

International Law Commission's 2001 Draft Articles on State Responsibility for Internationally Wrongful Acts, Article 7 of which deals with a state's responsibility for the acts of persons empowered to exercise government authority. *See Jones* ¶¶ 76-78; *see also id.* ¶ 12 (Lord Bingham). But whether a state is responsible under international law for the acts of its officials is a separate question from whether an individual is responsible under international law for his or her acts on behalf of a state.[15] On this second question, the Draft Articles state expressly that they "are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State." *See* International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries (2001), Art. 58. Inexplicably, neither Lord Bingham nor Lord Hoffmann cited Article 58, which discredits their reliance on Article 7.[16]

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[15] Lord Hoffmann's conflation of these two questions is also clear in his misplaced reliance on the 1927 arbitral decision in *Mallén v. United States*. *See Jones* ¶ 75, *citing Mallén v. United States of America*, 4 RIAA 173 (1927) (awarding damages to Mexico for the 1907 assault on a Mexican consul (Mallén) by a U.S. deputy constable (Franco)). There is no indication in that decision that the responsibility of the United States precluded any concurrent civil or criminal responsibility for the deputy constable whose acts were at issue; to the contrary, he was fined $100 for the assault. *See id.* at 181.

[16] The Commentaries to the Draft Articles also make clear that "the rules concerning attribution set out in this chapter are formulated for this particular purpose, and not for other

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Lords Bingham and Hoffmann both relied heavily on the 2004 U.N. Convention on the Jurisdictional Immunities of States and Their Properties, which defines "State" to include "representatives of the State acting in that capacity" and contains no express exception for torture. *See Jones* ¶¶ 10, 26 (Lord Bingham); *id.* ¶¶ 47, 66 (Lord Hoffmann). The U.N. Convention, which deals largely with state liability for commercial transactions, has not obtained even the 30 ratifications necessary for it to enter into force. The United States has not signed the Convention and is unlikely to do so because it differs substantially from the terms of the FSIA. *See* David P. Stewart, *The UN Convention on Jurisdictional Immunities of States and Their Properties*, 99 Am. J. Int'l L. 194, 205 (2005) (noting that the Convention does not contain exceptions for expropriation or terrorism); *see also id.* at 210-11 (noting other objections of the U.S. delegation). The absence of an exception to immunity from this Convention does not make such an exception unlawful under customary international law. As Mr. Stewart, who led the U.S. delegation, has observed with respect to the terrorism exceptions in

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purposes for which it may be necessary to define the State or its Government." Draft Articles at 39. It is inappropriate to use Draft Article 7, which codifies an international law principle developed to *protect* victims by providing them with a basis for diplomatic claims against the offending state, to curtail the remedies available to victims of such conduct. *See* Draft Articles at 46 (explaining rationale for attributing conduct performed with apparent authority to the state).

the FSIA, that "would read far too much into the consensus adoption of the convention." *Id.* at 206.

In sum, neither *Jones* nor the authorities on which it relies support Petitioner's assertion of blanket immunity for all acts taken by a foreign government official. The question before the House of Lords in *Jones* – whether customary international law requires an *exception* to the statutory immunity granted by the SIA – is different from the question in the United States – whether customary international law requires a *grant* of immunity in the first place. With respect to torture and extrajudicial killing at least, it does not.

CONCLUSION

This Court should affirm the decision of the Fourth Circuit Court of Appeals.

Dated: January 27, 2010

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 08-1555

IN THE

Supreme Court of the United States

MOHAMED ALI SAMANTAR,

Petitioner,

v.

BASHE ABDI YOUSUF *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RETIRED MILITARY PROFESSIONALS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are retired military officers. Lieutenant General Robert G. Gard Jr., USA (Ret.) is a retired Lieutenant General who served in the U.S. Army. His military assignments included combat service in Korea and Vietnam. He is currently a consultant on international security and President Emeritus of the Monterey Institute for International Studies.

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Major General Fred E. Haynes, USMC (Ret.) is a combat veteran of World War II, Korea and Vietnam. He was a captain in the regiment that seized Mt. Suribachi, Iwo Jima on February 23, 1945. In Korea, he was Executive Officer of the 2nd Bn., 1st Marines. During the Vietnam War, he commanded the Fifth Marines, and was G-3 of the Third Marine Amphibious Force. During the Kennedy and Johnson

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[1] No person or entity other than *Amici* made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties have consented to the filing of this brief, and the letters of consent have been filed with the Clerk.

eras, he served as Pentagon Director, Near Eastern and South Asian Affairs. As a general officer he commanded the Second and Third Marine Divisions. He is chairman of the Combat Veterans of Iwo Jima, and recently published a book, *The Lions of Iwo Jima: The Story of Combat Team 28 and the Bloodiest Battle of Marine Corps History.*

Rear Admiral John D. Hutson, JAGC, USN (Ret.) served in the U. S. Navy from 1973 to 2000. He was the Navy's Judge Advocate General from 1997 to 2000. Admiral Hutson now serves as President and Dean of the Franklin Pierce Law Center in Concord, New Hampshire.

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Professor Roger Handburg is a Professor of Political Science, University of Central Florida, and served as a Captain in the U.S. Army from 1969-1971. His areas of research include American security policy, courts and law, and space policy, and he has published numerous articles and books.

In light of their background and experience, *Amici* are uniquely qualified to address how prohibitions against torture support and protect our troops and promote U.S. national security interests; how international and domestic laws are designed to ensure that the United States does not serve as a safe haven for perpetrators of grave human rights abuses such as torture and extrajudicial killing; and how a decision to grant immunity to former foreign officials who have committed torture and are currently residing in the United States would undermine these interests.

The prohibition against torture is a fundamental principle of human rights law and the law of armed conflict. That prohibition would be meaningless without measures of accountability. Indeed, the U.S. military has an established tradition of adherence to international law, particularly the prohibition against torture, and a parallel commitment to holding perpetrators accountable for violations of the law. That tradition has served the U.S. military well. It has enabled the U.S. military to demand reciprocity from other countries, thereby better protecting its servicemen and women.

In the judgment of *Amici*, granting immunity to the perpetrators of egregious human rights abuses would undermine important military and national security interests that Congress has sought to preserve and promote in mandating accountability for torture and other abuses. Indeed, *Amici* note that rampant

human rights abuses, coupled with impunity, can sow the seeds for instability and chaos in other countries. That chaos, in turn, often leads to a vacuum of state power and the conditions under which international terrorist groups can thrive. Whether for humanitarian purposes or in defense of national security, U.S. military engagement may often then follow, as it did in the case of Somalia in the 1990's. *Amici* submit that it would be paradoxical for the United States to commit troops to combat but then allow its soil to become a safe haven for the individuals who created the tumultuous conditions leading to U.S. military intervention.

SUMMARY OF ARGUMENT

As this Court has observed, the "United States frequently employs Armed Forces outside this country – over 200 times in our history – for the protection of American citizens or national security." *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 273 (1990). International and domestic law, and the law of war in particular, provide key protections for members of our armed forces so deployed. The legal question in this case – whether the Foreign Sovereign Immunities Act ("FSIA") immunizes former foreign officials from suit under the Alien Tort Claims Statute ("ATS") and the Torture Victims Protection Act ("TVPA") – arises within this complex framework of international and domestic law.

Petitioner Mohamed Samantar ("Samantar") argues that, as a former government official of Somalia, he cannot be held accountable in the United States for torture and other atrocities, the same abuses our troops and civilians could face when overseas. Samantar's claim of immunity runs counter to the principles that have guided the U.S. military for

centuries, and a ruling in his favor would have profound implications for the U.S. military.

First, granting immunity to Samantar would call into question the U.S. commitment to accountability, thus increasing the risk of torture and abuse for our troops, prisoners of war, and civilians overseas. Experience demonstrates that U.S. adherence to and enforcement of the laws of war protects members of our military when engaged in combat or other operations overseas. Simply put, our soldiers receive better treatment at the hands of others when the United States steadfastly adheres to the key principles of international law. Thus, contrary to Petitioner's assertion it is the reciprocity of accountability – not impunity – that protects our troops.

Second, granting immunity would eviscerate the TVPA's powerful disincentive to torture – its mandate that no foreign official involved with torture will receive safe haven in the United States and that the perpetrators of torture who enter the United States will face civil liability for their wrongdoing. That disincentive plays an important role in U.S. foreign policy as it seeks to prevent the types of crises that create political instability and can lead to U.S. military engagement.

Third, in passing the TVPA, Congress explicitly found that the statute would be available to military personnel who are tortured while serving overseas. It would be manifestly unjust to deny U.S. military personnel, who have risked their lives in defense of this country, a forum for redress of harms that they suffered while serving overseas.

ARGUMENT

Throughout the course of its history, the United States has entered into numerous treaties and enacted many statutes that provide criminal and civil liability for torture and other abuses. The Geneva Conventions and the Convention against Torture are such treaties and they require parties to implement accountability measures to preclude impunity for torturers. In enacting these measures, the United States has demonstrated a consistent, full-throated commitment to the prohibition of torture and other abuses and to criminal and civil accountability for those who participate in such conduct. Likewise, the U.S. military has an established commitment to international law and has long enforced the prohibition against torture and accountability for the same.

The TVPA and the FSIA must be interpreted with this backdrop in mind; they are pieces of a larger policy that manifests a persistent, straightforward commitment to the ban on torture to accountability for its perpetrators. The immunity Samantar seeks will reverberate through the international community and diminish important reciprocal protections for our military and civilian personnel overseas, putting our military at risk. It will eliminate a meaningful deterrent against torture and other gross human rights abuses. It will also eliminate a key means of redress for our servicemen and women who are the victims of torture and atrocities abroad.

Amici urge this Court to conclude that Petitioner, like a member of our own military, is not above the law; that he should be held to account for the harm that he has inflicted; and that, after wreaking devastation in his own country, he should be not be afforded a safe haven in the United States.

I. OUR MILITARY HAS A LONG TRADITION OF ADHERENCE TO AND ENFORCEMENT OF THE LAW OF ARMED CONFLICT, PARTICULARLY THE PROHIBITION AGAINST TORTURE.

The prohibition against torture is a fundamental principle of international, domestic and military law. The four Geneva Conventions of 1949 (hereinafter the "Conventions of 1949") and the United Nations Convention Against Torture ("CAT") prohibit torture and abusive treatment in times of war and in times of peace.[2] The Conventions of 1949, to which all States are party, are a universal codification of the law of armed conflict and provide comprehensive standards for the treatment of persons in times of armed conflict.[3] U.S. military personnel are bound by and

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[2] The U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1984) ("CAT"), prohibits torture in all forms and circumstances. Article 2(2) reinforces that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture." *Id.* art. 2(2). The United States ratified the CAT in 1994 and noted that the prohibition against torture was "a standard for the protection of all persons, in time of peace as well as war." S. Exec. Rep. No. 101-30, at 11 (1990).

[3] *See, e.g.*, Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 ("GC I" or the "First Convention"); Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 ("GC II" or the "Second Convention"); Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("GC III" or the "Third Convention"); Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6

enjoy the protection of the obligations and rights set forth therein.

Article 3 common to the Conventions of 1949 provides minimum standards of treatment applicable in non-international conflicts. In particular, common Article 3 prohibits "violence to life and person, . . . mutilation, cruel treatment and torture; . . . [and] outrages upon personal dignity, in particular, humiliating and degrading treatment." See, *e.g.*, GC I, art. 3; GC II, art. 3; GC III, art. 3; GC IV, art. 3. Article 17 of the Third Geneva Convention prohibits mistreatment of prisoners of war, declaring that "[p]risoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind."[4] GC III art. 17. The Fourth Convention governs the treatment of civilians in times of armed conflict and provides key safeguards to protect them from the ravages of war, reinforcing the prohibition on torture and inhuman and degrading treatment.

Each of the Geneva Conventions defines torture as a grave breach and mandates that all States party

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U.S.T. 3516, 75 U.N.T.S. 287 ("GC IV" or the "Fourth Convention").

[4] Article 27 provides that protected persons "shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof or against insults." Article 31 prohibits "physical or moral coercion . . . against protected persons." and the prohibition against causing any physical suffering in Article 32 applies "not only to murder, torture, corporal punishments, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents." Finally, Article 118 reinforces that "all forms of cruelty without exception are forbidden." Notably, in this case, most of the allegations involve claims made by civilians.

undertake to search for and prosecute any person, regardless of nationality, who is alleged to have committed such acts. See, *e.g.*, GC III art. 130, GC IV art. 147. In light of this formal obligation to prosecute alleged torturers, Congress cannot have intended to grant such offenders immunity from civil liability on our shores.

A. The U.S. Military Has Always Prohibited Torture In Accordance With International Law.

Since its inception, the U.S. military has adhered to the law of armed conflict and condemned violent or abusive treatment. At the founding of our Republic, the Articles of War of 1776 criminalized "beating, or otherwise ill-treating any person" and also provided for punishment for any commander who failed to "see justice done on the offender." *Journals of the Continental Congress* § IX art. 1 (Sept. 20, 1776) (Articles of War).

The formal codification of the prohibition on torture and cruel treatment by the U.S. military, however, dates to the Civil War. In 1863, President Abraham Lincoln signed General Orders No. 100, also known as the Lieber Code. *Instructions for the Government of Armies of the United States in the Field* (Apr. 24, 1863). Today our military continues to uphold the values set forth in the Lieber Code – that military law must "be strictly guided by the principles of justice, honor and humanity – virtues adorning a soldier even more than other men, for the very reason that he possesses the power of his arms against the unarmed." *Id.* § I, art. 4. In particular, the Lieber Code expressly prohibits torture, stating that "[m]ilitary necessity does not admit of cruelty – that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in

fight, nor of torture to extort confessions." *Id.* § I, art. 16.[5]

In implementing the law of armed conflict into domestic military law and instructions, the U.S. military has emphasized its obligation to comply with the law in all military operations, as well as its long tradition of such compliance. Dep't of Def. Directive No. 2311.01E, ¶ 4.1 (May 9, 2006); Judge Advocate General's Sch., *Operational Law Handbook* 10 (Bill et al. ed. 2009) ("U.S. [law of war] obligations are national obligations, binding upon every Soldier, Sailor, Airman or Marine. DoD policy is to comply with the law of war "during all armed conflicts, . . . and in all other military operations," citing DoD 2311.01E, ¶ 3.1).

The prohibition of torture and other abusive treatment appears in the United States Department of the Army Field Manual 27-10, which promulgates the Army's interpretation of the law of war and incorporates references to international conventions, including the 1949 Geneva Conventions. See U.S. Dep't of the Army, Field Manual (FM) 27-10, *The Laws of Land Warfare* (July 1956) ("FM 27-10"). In particular, FM 27-10 incorporates Common Article 3 of the Conventions of 1949, *id.* art. 11, and prohibits torture and "other measures of brutality whether applied by civilian or military agents," *id.* art. 271.

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[5] The Lieber Code formed the foundation for the law of war, first codified in the Hague Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, 1 Bevans 247; Geneva Convention [IV] Respecting the Laws and Customs of War on Land and Regulations Annexed Thereto, Oct. 18, 1907, 26 Stat. 2277; and the Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 20221, 118 U.N.T.S. 343 (1929 Geneva Convention).

B. The U.S. Military Has A Centuries-Long Tradition Of Accountability For Torture And Other Abuses.

Since the earliest days of the Republic, the U.S. military has valued and enforced accountability for misdeeds. During the Revolutionary War, numerous soldiers were charged with and found guilty of mistreating local civilians. See James C. Neagles, *Summer Soldiers: A Survey & Index of Revolutionary War Courts Martial* 103, 189 (1986) (describing, *inter alia*, courts-martial of Capt. James Christy and Thomas Man for "[b]eating a number of persons . . . and other abus[es]").

In 1865, Union Army officers issued a pronouncement that crystallized the importance of military justice in the U.S. military tradition:

> The many honorable gentlemen who hold commissions in the army of the United States . . . would keenly feel it as an insult to their profession of arms for any one to say that they could not or would not punish a fellow-soldier who was guilty of wanton cruelty to a prisoner, or perfidy towards the bearers of a flag of truce. [11 Op. Att'y. Gen. 297, 303-04 (1865).]

U.S. courts-martial also tried numerous U.S. military personnel and Philippine insurgents during the American counter-insurgency campaign in the Philippines at the turn of the century. In particular, Major Edwin Glenn was convicted of using torture to obtain information or confessions from insurgents. See *Trials of Court-Martial in the Philippines Islands in Consequence of Certain Instructions*, S. Doc. No. 57-213, at 1-43 (1903). Finding Major Glenn's light sentence and his lieutenant's acquittal on the same charges inadequate, the Judge Advocate General

declared that "[n]o modern state, . . . can sanction . . . a resort to torture with a view to obtain confessions, as an incident to its military operations." *Id.* at 42.

The Uniform Code of Military Justice replaced the Articles of War in 1951, and the military continued to enforce its standards through the Korean War and the Vietnam War. While serving in Korea, for example, U.S. Marine Sergeant Gallagher was convicted of murdering and torturing other fellow prisoners of war while held captive by the Chinese. *United States* v. *Gallagher*, 7 C.M.A. 506 (1957).

Granting Samantar immunity from liability for the atrocities he is alleged to have perpetrated during his tenure as Defense Minister of Somalia would undermine this long tradition of accountability and adherence to domestic and international law. As two former Judge Advocates state,

> We have learned . . . that victory without justice is meaningless if justice is not guaranteed to those who would risk their life for it. A defense organization cannot survive without a responsive system of law, since its very progress and success during conflict depends on the binding force of law and the effective discipline that precedes wartime endeavor. [Earle F. Lasseter & James B. Thwing, *Military Justice in Time of War*, 68 A.B.A.J. 566, 569 (1982)].

A grant of immunity to foreign officials who participate in torture would send a demoralizing message to our men and women in uniform – to wit, that we expect them to prosecute our own wrongdoers at the same time that we offer legal immunity and protection to perpetrators of gross atrocities abroad who are present here on our soil.

II. GRANTING IMMUNITY WOULD UNDERMINE THE COMPREHENSIVE FRAMEWORK THAT THE U.S. HAS DESIGNED TO DETER TORTURE, ENSURE ACCOUNTABILITY, AND PROTECT OUR TROOPS.

The TVPA was passed to meet U.S. obligations under the Convention against Torture.

> This legislation will carry out the intent of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was ratified by the U.S. Senate on October 27, 1990. The Convention obligates state parties to adopt measures to ensure that torturers within their territories are held legally accountable for their acts. This legislation will do precisely that by making sure that torturers and death squads will no longer have a safe haven in the United States. [S. Rep. No. 102-249, at 3 (1991)].

The purposes of U.S. domestic and military laws prohibiting torture are neither academic nor illusory; nor are these laws unrelated to our military's daily operations. Rather, as the following sections demonstrate, our servicemen and women depend on the obligations and protections of these international and domestic laws when they are deployed overseas.

A. U.S. Adherence To The Law Of Armed Conflict And The Prohibition Of Torture In Particular Provides Reciprocal Protections For U.S. Servicemen And Women Overseas.

Our steadfast adherence to international law has enabled the United States to demand greater protection for military personnel captured abroad. In the same way, our commitment to accountability for

perpetrators of torture and other abuses – whether U.S. or foreign nationals – provides a critical foundation for demanding accountability for perpetrators of abuses *against* U.S. military and civilian personnel. Thus, the ability to seek accountability offers additional leverage for protecting our troops.

Reciprocity forms one of the bedrock foundations for adherence to the laws of war. See Sean Watts, *Reciprocity and the Law of War*, 50 Harv. Int'l L.J. 365, 368 (2009) ("the law of war has long been conditioned on notions of reciprocal obligation and observation"). Beyond the historic and universal values underpinning the basic legal principles, nations comply with their obligations to respect enemy forces and protect civilians from the ravages of war because they expect enemy forces to do the same. The U.S. military trains its troops in the importance of reciprocity, advising them that "[o]bserving these rules will encourage the enemy to do the same, increase the chance that he will surrender, and make the return to peace easier." See Headquarters, Dep't of The Army, Training Circular 27-10-3, *Instructor's Guide, The Law of War* 4 (1985). Although our obligations do not depend on the enemy's adherence to the law, the U.S. military remains firmly convinced that our adherence to the law positively influences our enemies' behavior.

Men and women in the U.S. military have benefited from our adherence to international law and to the prohibition of torture in recent history. In Vietnam, for example, captured U.S. personnel initially faced atrocious treatment at the hands of the North Vietnamese army, including torture and beheadings. In 1967, the United States began a policy of extending prisoner-of-war status to all captured Vietnamese army personnel and all Viet Cong, even

those who did not follow the laws of war. See U.S. Military Assistance Command for Vietnam, Annex A of Directive No. 381-46 (Dec. 27, 1967), *reprinted in Contemporary Practice of the United States Relating to International Law*, 62 Am. J. Int'l L. 754, 766-67 (Charles I. Bevans ed., 1968). Obtaining "reciprocal benefits for American captives" was a major reason for this decision. See Maj. Gen. George S. Prugh, Dep't of the Army, *Vietnam Studies, Law at War: Vietnam 1964-1973*, at 62-63 (1975). The Vietnamese began according prisoner-of-war status to captured U.S. personnel and treatment of American captives improved as a result.

More recently, after forces under the control of Somali warlord Mohamed Farah Aideed captured U.S. Warrant Officer Michael Durant in 1993, the United States demanded that Durant receive treatment in accordance with international law and the Geneva Conventions. See Neil McDonald & Scott Sullivan, *Rational Interpretation in Irrational Times: The Third Geneva Convention and the "War on Terror,"* 44 Harv. Int'l L.J. 301, 310 (2003). The United States specifically argued that breach of the protections set forth in the Geneva Conventions would leave Aideed liable for a violation of customary law. *Id.* Immediately following the U.S. demands, harsh treatment of Durant stopped and he was soon released. *Id.*

A year later, Chief Warrant Officer Bobby Hall was captured by North Korea when his helicopter strayed into North Korean airspace and was shot down. Despite uncertain applicability of the Geneva Conventions because of questions about whether there was an actual armed conflict, the North Koreans stated that Hall would be treated as a POW and he was released 13 days later. *Id.* at 311.

Samantar argues that denying immunity would "risk[] serious reciprocal implications" for U.S. officials. Pet. Brief 35-36. But the reciprocity on which our military depends is the reciprocity of accountability, the foundation of the law of war and the prohibitions on abusive treatment. This reciprocity – not reciprocity of impunity to which Petitioner alludes – is integral to our national security and our success in military operations abroad. If we expect those who commit atrocities against our personnel to be held accountable, the United States must demonstrate a like commitment to holding perpetrators within its jurisdiction accountable for atrocities. Granting Samantar immunity for torture and other alleged abuses against victims in this case flies in the face of this goal. Doing so undermines the fundamental guarantees the United States promises its own citizens, particularly military, diplomatic, intelligence and other personnel operating abroad.

B. Accountability Measures, Like The TVPA, Promote The Critical National Security Objective Of Deterring Rampant Human Rights Violations.

History has demonstrated that countries in which massive human rights abuses are perpetrated can readily turn into breeding grounds for instability and conflict. Notably for this case, in 1992, the United States committed troops to a peacekeeping operation in Somalia. That operation was necessary because after a decade of brutal repression under the Siad Barre regime (of which Samantar was the defense minister), Somalia descended into a state of civil war, which led to the deaths of hundreds of thousands of

people from war and famine.[6] As defense minister, Samantar was an architect of that repression.

Somalia is hardly the only example. In recent times, human rights abuses and armed conflict have coincided in Bosnia and Haiti. Indeed, scholars have concluded that "failed states and human rights wars ha[ve] become the breeding grounds of the two great threats we face[] – increasing terrorism and renewed genocide." John Shattuck, *The Legacy of Nuremberg: Confronting Genocide and Terrorism Through the Rule of Law*, 10 Gonz. J. Int'l L. 6, 10-12 (2006).

The TVPA was intended to provide a powerful disincentive to human rights abusers. "[I]n addition, one reason for enacting this bill is to discourage torturers from ever entering this country. There is no question that torture is one of the most heinous acts imaginable, and its practitioners should be punished and deterred from entering the United States." 138 Cong. Rec. S2667, 52688 (daily ed. Mar. 3, 1992) (statement of Sen. Specter).[7] That effect is critical

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[6] *See* Human Rights Watch, *Human Rights Watch World Report 1993 - Somalia*, ¶ 3 (Jan. 1, 1993), *available at* http://www.unhcr.org/refworld/docid/467fca601e.html; Dep't of Pub. Info., United Nations, *United Nations Operation in Somalia I*, ¶ 1, Mar. 21, 1997), http://www.un.org/Depts/DPKO/Missions/unosomi.htm.

[7] For example, the Guatemalan General Hector Gramajo came to the United States to obtain a graduate degree but fled after being sued for human rights violations under the ATS in *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995). *See* Amnesty Int'l, *United States of America: A Safe Haven for Torturers* 45-46 (2002). Subsequent to the ATS lawsuit, Gramajo's visa was revoked and he was barred from reentering the country. In addition, his political aspirations ended as his party failed to nominate him for office. Sandra Coliver, Jennie Green & Paul Hoffman, *Holding Human Rights Violators Accountable by Using International Law in U.S. Courts*, 19 Emory Int'l L. Rev.

because deterring massive human rights violations of the type experienced in Somalia can also mean deterring or alleviating the conditions that lead to military engagement.

Somalia has a long history of inter-clan rivalry.[8] However, these tensions were managed through traditional mechanisms until these and other traditional social institutions were undermined during the Siad Barre dictatorship (1969-1991). Once the traditional institutions collapsed, large-scale conflict, marked notably by brutal acts of torture, erupted and much of the country descended into civil war. U.S. Dep't of State, *Somalia Human Rights Practices, 1994*, ¶ 1 (Feb. 1995), *available at* http://dosfan.lib.uic.edu/ERC/democracy/1994_hrp_report/94hrp_report_africa/Somalia.html.

That period of instability led to U.S. military involvement in December 1992. The Bush administration committed U.S. ground troops as part of a multinational force to ensure delivery of humanitarian aid to Somalia. Dep't of Pub. Info., United

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169, 178 (2005); *see also* Tim Golden, *Controversy Pursues Guatemalan General Studying in U.S.*, N.Y. Times, Dec. 3, 1990, at A6.

After an ATS suit was filed against the former Ethiopia official, Kelbessa Negewo, *Abebe-Jira* v. *Negewo*, 72 F.3d 844 (11th Cir. 1996), the U.S. Attorney's office began denaturalization proceedings and removed Negewo to Ethiopia. *See Concerning Genocide and the Rule of Law: Hearing Before the S. Subcomm. On Human Rights Concerning Genocide and the Rule of Law*, 110th Cong. 7 (Feb. 5, 2007) (Statement of Sigal P. Mandelker, Deputy Assistant Attorney General), *available at* http://justice.gov/crimir al/pr/testimony/2007/02/ 2007_4979_02-07-07daag-testimony.pdf.

[8] *See generally* Brief Of *Amici Curiae* Academic Experts in Somali History.

Nations, *supra*, ¶ 13. Although the troops were initially scheduled to remain in Somalia for one month, the humanitarian mission was extended by the Clinton administration.[9]

U.S. casualties mounted throughout the year. In October 1993, 18 U.S. soldiers died in a now infamous street battle in Mogadishu.[10] By the time U.S. troops withdrew in 1994, more than two dozen U.S. soldiers had died. Bureau of African Affairs, *supra* ¶ 14 ("The United States continued operations until March 25, 1994, when U.S. forces withdrew.").

Somalia has yet to fully recover from that destabilizing period. Indeed, brazen acts of piracy embody the lawlessness that still characterizes parts of Somalia. The United States and other countries now routinely use their military forces to patrol the waters off the coast of Somalia.[11] See *supra* n.8. Deterring the chain of human rights abuses, crisis and military intervention directly benefits the

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[9] *See* Bill Clinton, President of the U.S., Address on Somalia (Oct. 7, 1993) *in The Somalia Mission; Clinton's Words on Somalia: 'The Responsibilities of American Leadership,'* N.Y. Times, Oct. 8, 1993, *available at* http://www.nytimes.com/1993/10/08/world/somalia-mission-clinton-s-words-somalia-responsibilities-american-leadership.html?pagewanted=1.

[10] *See* Human Rights Watch, *supra* ¶ 17; Bureau of African Affairs, U.S. Dept. of State *Background Note: Somalia, History*, ¶ 14 (Jan. 2010), *available at* http://www.state.gov/r/pa/ei/bgn/2863.htm#history.

[11] Navy Lt. Jennifer Cragg, U.S. Dep't of Def., Am. Forces Press Serv., *Navy Task Force, Partner Nations Deter Pirate Attacks*, Jan. 30, 2009, http://www.defense.gov/news/newsarticle.aspx?id=52890; Bureau of Political-Military Affairs, US, Dep't of State, Fact Sheet, *United States Actions To Counter Piracy Off the Horn of Africa* (Sept. 1, 2009), http://www.state.gov/t/pm/rls/fs/128540.htm.

military. While the TVPA will not, by itself, stave off crises overseas, to the extent that it deters individuals from engaging in human rights abuses in the first instance, it can alleviate some of the conditions that precipitate military involvement.

III. WHEN IT ENACTED THE TVPA, CONGRESS INTENDED TO BUTTRESS THESE PROTECTIONS AND PROVIDE A REMEDY FOR U.S. TROOPS TORTURED OVERSEAS.

This Court has repeatedly stated that foreign policy and national and military security are core areas for the political branches. See, *e.g.*, *Rostker* v. *Goldberg*, 453 U.S. 57, 64-65 (1981); *Dep't of the Navy* v. *Egan*, 484 U.S. 518, 530 (1988); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). In multiple statutes, Congress has made torture and cruel, inhuman and degrading treatment subject to criminal prosecution in federal courts. Indeed, the right to be free of physical torture is recognized by all Nations. See *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 732 (2004). This legal framework provides an important supplement to international, domestic and military law banning torture and ensures that there will be no safe haven in the United States for torturers and perpetrators of atrocities, including those who perpetrate atrocities against U.S. military or civilian personnel serving overseas.

The ATS and the TVPA provide a civil remedy for victims whose torturers come under the jurisdiction of U.S. courts. The TVPA states:

> An individual who, under actual or apparent authority, or color of law, of any foreign nation

> (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
>
> (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death. [28 U.S.C. § 1350 note.]

This plain language provides victims of torture and extrajudicial killing (or their representatives) with the right to bring a civil action seeking damages against individual officials of foreign nations who act under color of law or with actual or apparent authority. In enacting the TVPA, the Senate emphasized that

> [o]fficial torture and summary execution violate standards accepted by virtually every nation. This universal consensus condemning these practices has assumed the status of customary international law. [S. Rep. No. 102-249, at 3.]

Congress also recognized that our troops are vulnerable to torture when serving abroad. Thus, in passing the TVPA, Congress clearly stated its intent to protect our military:

> We have as a matter of current concern the torture of the U.S. service men and service women and the potential for more torture which, in addition to being a war crime and a violation of the Geneva Convention, would also provide a basis for a civil lawsuit in a U.S. court if this bill were passed. . . . Unfortunately, torture hits Americans abroad as well as innocent foreigners. Our soldiers languishing in Saddam Hussein's prisons have almost certainly been brutally

> tortured. This bill will give our P.O.W.'s a cause of action if any of their torturers should ever enter the United States in the future. [137 Cong. Rec. S1369, S1378 (daily ed., Jan. 31, 1991) (statement of Sen. Specter).]

In addition, Congress has emphasized its commitment to ensuring that torturers who have abused U.S. troops must be brought to justice:

> Those who murdered or tortured our American servicemen are still at large somewhere . . . There is no statute of limitations on the crimes committed against these American servicemen. Neither shall there be a statute of limitations on our commitment to discovering the true identity of those responsible for such crimes, so that they may be brought to justice. [*The Cuban Program: Torture of American Prisoners by Cuban Agents: Hearing Before the Comm. on Intern'l Relations*, 106th Cong. 1 (1999) (Statement by Rep. Benjamin A. Gilman, Chairman of the Committee).]

Construing the TVPA to preclude suits against former government officials would directly contravene Congress' intent and undermine protections for U.S. military and civilian personnel deployed overseas by foreclosing key options for seeking redress in the event of capture and abusive treatment.

Moreover, as Congress recognized in passing the TVPA, the United States should not be a safe haven for individuals who perpetrate torture. For the same reasons that survivors of torture should not be forced to confront those who tortured them on the streets of D.C., our servicemen and women should not be forced to live next door to those who caused them to put their lives in harm's way overseas.

In enacting the TVPA, Congress invoked its power to "define and punish . . . Offences against the Law of Nation," U.S. Const. art. I § 8, cl. 10; see S. Rep. No. 102-249, at 5. In doing so, it "put[] torturers on notice that they will find no safe haven in the United States. Torturers may be sued under the bill if they seek the protection of our shores." See 137 Cong. Rec. H11244 (daily ed. Nov. 25, 1991) (statement of Rep. Mazzoli.). The Act cannot be meaningfully enforced if the FSIA provides foreign officials involved in torture and other abuses with immunity from civil actions.

Congress has carefully delineated the circumstances in which victims of torture and extrajudicial killing – including U.S. servicemen and women – are entitled to seek civil redress against foreign officials in civil courts in the United States. This Court should defer to Congress's determination that foreign officials involved with torture and extrajudicial killings are subject to civil suits if they choose to come to the United States. The TVPA is part of an inter-related statutory scheme that holds torturers accountable for their acts. That scheme, *inter alia*, protects U.S. citizens abroad, including U.S. servicemen and women, by deterring torture and other abuses.

* * * *

Amici respectfully submit that Congress clearly intended to implement U.S. obligations under the Geneva Conventions and the Convention against Torture by holding foreign government officials accountable for torture. Failure to respect congressional intent will undermine our ability to insist that other nations do likewise, with grave implications for U.S. service members and civilians who fall into the hands of abusive foreign powers.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 08-1555

IN THE

Supreme Court of the United States

MOHAMED ALI SAMANTAR,
Petitioner,

v.

BASHE ABDI YOUSUF, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF SENATOR ARLEN SPECTER, SENATOR RUSSELL D. FEINGOLD AND REPRESENTATIVE SHEILA JACKSON LEE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE* [1]

Amicus curiae, Arlen Specter, is serving his fifth term as a United States Senator from the Commonwealth of Pennsylvania. First elected in 1980, he is the longest serving United States Senator in Pennsylvania history. Senator Specter is a former Chairman and former Ranking Member of the Senate Committee on the Judiciary, of which he has been a member since assuming his duties in the Senate. He has long supported the rights of victims of torture, and the heirs of those subjected to extrajudicial killing, to seek redress in the courts of the United States.

From 1986 through 1989, Senator Specter introduced a series of bills to protect the victims of torture, none of which were enacted into law. On January 31, 1991, he introduced the Torture Victim Protection Act of 1991 (S. 313), which was considered by the full Committee on the Judiciary, favorably reported as amended, and complemented by a comprehensive committee report. *See* S. REP. NO. 102-249, 102d Cong., 1st Sess. (1991) [hereinafter Senate Report]. The House Committee on the Judiciary favorably reported a bill bearing the same title on November 25, 1991, and likewise issued a committee report. *See* H.R. REP. NO. 102-367, Pt. 1, 102d Cong., 1st Sess. (1991), *reprinted in* 1992 U.S.C.C.A.N. 84 [hereinaf-

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[1] Pursuant to Supreme Court Rule 37.6, *amici* represent that no counsel for a party authored this brief in whole or in part and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2(a), *amici* also represent that all parties have received timely notice of this brief and consented to its filing, and letters reflecting their consent have been filed with the Clerk.

ter House Report]. The full House of Representatives then passed the bill that, in 1992, was enacted into law. Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note (1992) [hereinafter TVPA]. [ ] Senator Specter was instrumental in the passage of that bill. *See* 138 CONG. REC. S2667-04 (1992) (statements of Sen. Specter).

Amicus curiae, Russell D. Feingold, is serving his third term as a United States Senator from the state of Wisconsin. Senator Feingold is Chairman of the Subcommittee on the Constitution of the Senate Committee on the Judiciary, and is a member of the Human Rights Subcommittee. He is also the Chairman of the Subcommittee on African Affairs of the Senate Committee on Foreign Relations, on which he has served since first coming to the Senate in 1993. On the Subcommittee, Senator Feingold has worked tirelessly to raise awareness about human rights violations in Africa and has focused on conflict and human rights abuses in the Horn of Africa, particularly Somalia. He has visited the region multiple times, chaired several relevant hearings, and authored legislation on Somalia. The *New York Times* has labeled him "the Senate's leading expert on Somalia." Senator Feingold has argued throughout his time in the Senate that the United States needs to do more to ensure that human rights abusers are held accountable for their crimes and that our country does not become a safe haven for individuals guilty of torture, genocide, or other human rights violations.

Amicus curiae, Congresswoman Shelia Jackson Lee (Texas), is a member of Congress who also supports the TVPA. Representative Jackson Lee participated among the *amici* supporting respondents when this

case was before the United States Court of Appeals for the Fourth Circuit. As an outspoken supporter of the Torture Victims Protection Act, Congresswoman Sheila Jackson Lee has consistently voted in favor of legislation that would support the victims of torture in the United States in addition to condemning the aggressors of such horrible crimes against humanity. During the 105th Congress, Congresswoman Jackson Lee helped lead the effort to pass H.R. 4309, a bill to authorize the creation of numerous torture victim rehabilitation and treatment centers across the United States, as well as across the world. These centers have been instrumental in helping victims of torture to reintegrate into society and return to a normal life. Congresswoman Jackson Lee also offered her support to foreign victims of torture by requiring all Foreign Service Officers with the State Department to identify and assist the foreign victims of torture.

Being intimately familiar with the purpose, text and legislative history of the TVPA, *amici* urge this Court to interpret the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (2000) [hereinafter FSIA], so as to ensure that, as Congress intended, former foreign officials who engaged in torture and extrajudicial killing remain liable for damages under the TVPA.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This civil human rights case arises out of catastrophic events of torture, rape, and extrajudicial killing, which occurred in the former Democratic Republic of Somalia [hereinafter Somalia] from 1969 to 1991. These events were precipitated by a 1969 "coup led by Major General Mohamed Siad Barre,"

who "overthrew the first and only democratic government of the new nation of Somalia." J.A. 60.

Petitioner Mohamed Samantar "served as First Vice President and Minister of Defense" in Somalia "[f]rom about January 1980 to December 1986 . . . ." J.A. 58. Beginning around January 1987, Petitioner Samantar "was appointed Prime Minister of Somalia, a position he held until approximately 1990." *Id.* In his capacity as Prime Minister, Samantar commanded the National Security Service, the Red Berets, and the military police known as Hangash. J.A. 62. These intelligence gathering forces, in conjunction with Somali Armed Forces, were "responsible for the widespread and systematic use of torture, arbitrary and prolonged detention, and extrajudicial killing against the civilian population of Somalia." J.A. 62.

Toward the end of the Barre regime, in the late 1980s and early 1990s, the Somali human rights abuses sanctioned by Petitioner Samantar came to the attention of the United States Senate Committee on Foreign Relations and the United States House of Representatives Committee on Foreign Affairs, both of which received several reports from the United States Department of State chronicling human rights abuses, torture, and extrajudicial killing in Somalia under the Barre regime. *See, e.g.*, U.S. Dept. of State, Country Reports on Human Rights Practices for 1990, Submitted to the House Committee on Foreign Affairs and the Senate Committee on Foreign Relations, 102nd Cong., 1st Sess., at 344-345 (Joint Comm. Print 1991) (recounting the extrajudicial killing of approximately sixty to one hundred civilians at a soccer match by army units and presidential guards, or Red Berets, and the torture of "prisoners held by

security forces"); U.S. Dept. of State, Country Reports on Human Rights Practices for 1989, Submitted to the House Committee on Foreign Affairs and the Senate Committee on Foreign Relations, 101st Cong., 2nd Sess., at 322 (Joint Comm. Print 1990) (noting the summary execution of "at least 46 young men, mainly Isaaks," at a beach, and complaints of the "Mig" torture[2] being implemented against detainees).

In part, these reports led Congress to pass the TVPA. *See* House Report, *supra*, at 3 ("Despite universal condemnation [of torture and extrajudicial killing], many of the world's governments still engage in or tolerate torture of their citizens, and state authorities have killed hundreds of thousands of people in recent years."); Senate Report, *supra*, at 3 (similar). Congress intended the TVPA "to provide a Federal cause of action against any *individual* who, under actual or apparent authority, or color of law, of any foreign nation, subjects any individual to torture or extrajudicial killing." House Report, *supra*, at 2 (emphasis added); *see also* Senate Report, *supra*, at 3 (same). Congress drafted the TVPA to apply to individuals, not states, in order to avoid the assertion that claims based on torture and extrajudicial killing are barred by the FSIA. 28 U.S.C. §§ 1602-1611. By alluding to "actual or apparent authority, or under color of law," Congress anticipated and rebutted

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[2] This form of torture involves forcing the victim "down on the ground where the interrogators . . . tie[] his hands and feet together behind his back so that his body [is] arched backward in a slightly-tilted 'U' shape, with his arms and legs in the air." *See Yousuf v. Samantar*, 2007 WL 2220579, at *3 (E.D.Va. 2007). It was called the "'Mig' because it placed the prisoner's body in a shape that resembled the Somali Air Force's MIG aircraft." *Id.* at *3 n. 6.

attempts to circumvent its intent by application of the FSIA to TVPA claims against individuals. Extending the FSIA to allow individuals to claim an immunity expressly reserved for sovereigns would completely undermine the TVPA, which Congress drafted with the purpose of imposing liability on individuals who engage in torture or extrajudicial killing abroad, under color of law or, with the actual or implied authority of a foreign state.

In enacting the TVPA, 28 U.S.C. § 1350 note (2000),[3] Congress made a calibrated decision to enforce the law of nations while balancing foreign policy, national security, and domestic interests, including ensuring that those who avail themselves of the protections and privileges of residency in the United States also bear responsibility for their actions, especially actions as significant as torture. To construe the FSIA as a jurisdictional bar to the application of the TVPA to individuals is contrary to Congress's intent to provide redress for egregious acts that infringe human rights and is an affront to human dignity. Indeed, extending FSIA immunity to foreign government officials responsible for torture would effectively nullify the TVPA.

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[3] Sec. 2. Establishment of civil action.

(a) Liability.—An *individual* who, under actual or apparent authority, or color of law, of any foreign nation—

(1) subjects an individual to torture *shall*, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing *shall*, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

28 U.S.C. § 1350 note (emphasis added).

The text, structure, and legislative history of the FSIA establish that sovereigns, not individuals, are entitled to its limited immunity. If Congress had intended the FSIA to apply to individuals, it would have said so explicitly. Instead, the FSIA grants immunity to "a foreign state," including "an agency or instrumentality of a foreign state." 28 U.S.C. § 1604. "An agency or instrumentality," in turn, is defined in reference to corporate or business enterprises only; no statutory language suggests an individual official may invoke the FSIA immunity.[4] A review of the legislative history likewise refers to "a variety of [corporate] forms," or entities, none of which include an individual. H.R. REP. NO. 94-1487 (1976), at 15-16, *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6613-6615.

Even if the Court holds that FSIA immunity extends to individuals who are presently an "agency or instrumentality of a foreign state," it should nonetheless decline to extend such coverage to former government officials. In *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), this Court interpreted the text of the FSIA's "agency or instrumentality" language to

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[4] "An 'agency or instrumentality of a foreign state' means any entity—

> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country."

28 U.S.C. § 1603(b).

cover only agencies or instrumentalities in existence at the time of suit, not at the time that the alleged tort arose. The statutory text and legislative history of the TVPA evidence a Congressional intent to hold human rights violators who commit torture and extrajudicial killing accountable through a civil remedy. Finally, in passing the TVPA, Congress sought to preclude human rights violators from seeking a safe haven in the United States long after they have been deposed from office and have fled the country in which the acts occurred.[5]

ARGUMENT

I. THE TEXT AND LEGISLATIVE HISTORY OF THE TVPA DEMONSTRATE THAT CONGRESS INTENDED TO CODIFY A CAUSE OF ACTION AGAINST INDIVIDUALS WHO TORTURED OR ENGAGED IN EXTRAJUDICIAL KILLING UNDER COLOR OF LAW

1. This Court determines a statute's legislative objective by beginning with an examination of whether the text is plain and unambiguous. *See Carcieri v. Salazar*, ___ U.S. ___, 129 S.Ct. 1058, 1063 (2009); *Smith v. Doe*, 538 U.S. 84, 92 (2003);

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[5] Petitoner Samantar's *amicus*, Kingdom of Saudi Arabia, argues that if FSIA immunity does not apply, common law immunity should prevail in Samantar's favor. Kingdom of Saudi Arabia Br. at 23-27. This brief will not address the applicability of common law immunity because it is not a question for which *certiorari* was granted. Moreover, the issue was not squarely decided by the Fourth Circuit, but was, instead, among the issues to be considered upon remand in the district court. *See Yousuf v. Samantar*, 552 F.3d 371, 383 (4th Cir. 2009) (concluding that questions of common law immunity, statute of limitations expiry, and failure to exhaust should be addressed in the first instance by the district court).

New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995). The text of Section 2 of the TVPA clearly provides a cause of action against individuals who subject others to torture or extrajudicial killing "under actual or apparent authority, or color of law, of any foreign nation." 28 U.S.C. § 1350 note. Congress intended to target the conduct of foreign officials acting with an apparent imprimatur of state authority. Hence the Senate report noted, "this legislation does not cover purely private criminal acts by individuals or nongovernmental organizations." Senate Report at 8. Instead, "the phrase 'actual or apparent authority or under color of law' is used to denote torture and extrajudicial killings committed by officials both within and outside the scope of authority." *Id.* In the immediate aftermath of *Hafer v. Melo*, 502 U.S. 21, 27-28 (1991) (refusing to accept the "novel proposition" that a "color of state law" requirement "insulates" the defendant from a personal capacity suit), Congress explicitly urged courts to "look to principles of liability under U.S. civil rights laws, in particular section 1983 of title 42 of the United States Code, in construing 'under color of law'. . . ." *Id.*

Importantly, the text of the TVPA does not contain any exemption for individuals who are or were government officials of a foreign state. While Congress could have excluded these individuals from the TVPA's reach when drafting the statute, it declined to do so. *Cf. United States v. Fausto*, 484 U.S. 439, 447 (1988) (noting that exclusion of certain employees from the Civil Service Reform Act of 1978 "displays a clear congressional intent to deny the excluded employees the protections" of a provision providing for judicial review). Instead, Congress

imposed liability on any individual who subjects others to torture or extrajudicial killing without exclusions for those who occupy or occupied official governmental positions.

2. Beyond the statutory language, the legislative history of the TVPA also supports its application to foreign government officials. In *Sosa v. Alvarez-Machain*, this Court described the TVPA as "a clear mandate . . . providing authority that 'establish[es] an unambiguous and modern basis for' federal claims of torture and extrajudicial killing." 542 U.S. 692, 728 (2004) (quoting H.R. Rep. No. 102-367, pt. 1, p.3 (1991)). The outcome in this case will determine whether that clear mandate is eviscerated by an application of the FSIA that Congress never intended and that this Court has never endorsed. To find that the FSIA precludes a cause of action against any individual who claims to have acted as an agent or instrument of a foreign state would undermine the TVPA's mandate and frustrate legislative intent with respect to both statutes.

The TVPA serves the twin purposes of denying torturers refuge from accountability for their conduct and providing victims a measure of relief for the harm that they suffered. As Congress recognized, "[t]orture poses a pervasive threat to the well-being of humankind. We must take a strong stand against this heinous practice." *Torture Victim Protection Act: Hearing on H.R. 1417 Before the Subcomm. on Human Rights and International Organizations of the H. Comm. on Foreign Affairs*, 100th Cong. 2nd Sess. (1988) (statement of Rep. Yatron, Chairman, H. Subcomm. on Human Rights and International Organizations). Congress crafted the TVPA so "that in the United States, the individuals who have

tortured will be held accountable, and the victims will be compensated in part for what they have endured." *Id.* *See also* 137 CONG. REC. H11244-04, at H11244 (1991) (statement of Rep. Mazzoli) ("[The TVPA] puts torturers on notice that they will find no safe haven in the United States.").

The legislative history of the TVPA confirms that successful cases pursued against torturers under the Alien Tort Statute [hereinafter ATS], 28 U.S.C. § 1350 (2000), reinforced Congress's determination that the TVPA must reach acts by individual government officials. In passing the TVPA, Congress explicitly endorsed two ATS cases, *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), and *Fortí v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987), *reconsideration granted in part on other grounds*, 694 F. Supp. 707 (N.D. Cal. 1988). *See also* S. REP. NO. 102-249, *supra*, at 3-4 ("The *Filártiga* case has met with general approval."). In both cases, the respective courts held that claims against government officials arising from acts of torture were actionable under the ATS. *See Filártiga*, 630 F.2d at 878 (holding that torture claims under the ATS could go forward against the former Inspector General of Police for Asunción, Paraguay); *Fortí*, 672 F. Supp. at 1535 (denying a motion to dismiss an ATS action against a former Argentine general for torture, murder, and prolonged arbitrary detention).

In the face of disagreement among courts as to the depth and breadth of valid torture claims under the ATS, Congress passed the TVPA to ensure that the justice delivered to the victims in *Filártiga* and *Fortí* would be available to all victims of "torture committed under official authority." 135 CONG. REC. H6423-01, at H6426 (1989) (statement of Rep. Broomfield).

After passage of the TVPA, the Second Circuit acknowledged the statute as a Congressional endorsement of *Filártiga*. *See Kadic v. Karadzic*, 74 F.3d 377, 378 (2d Cir. 1996) ("Congress has made clear that its enactment of the [TVPA] was intended to codify the cause of action recognized by this Circuit in *Filártiga*, even as it extends the cause of action to plaintiffs who are United States citizens."). And this Court agreed in 2004. *See Sosa*, 542 U.S. at 731 (describing the TVPA as Congressional endorsement of, and supplement to, *Filártiga*).

3. Congress passed the TVPA with the purpose, in part, of implementing the terms of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which the Senate had ratified nearly two years earlier in 1990 [hereinafter Convention Against Torture]. *See* 138 CONG. REC. S2667-04 (1992) (Senator Specter's colloquy statement that the TVPA accomplishes the purpose of the Convention Against Torture); S. REP. NO. 102-249, at 3 (1991) (stating that the TVPA will carry out the intent of the Convention Against Torture); H.R. REP. NO. 102-367, at 3 (1991) (noting that the Convention Against Torture requires signatories to "adopt measures to ensure that torturers are held legally accountable for their acts"). More specifically, the TVPA implements Article 14(1) of the Convention Against Torture, which provides:

> [e]ach State Party *shall* ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of

> an act of torture, his dependents shall be entitled to compensation.

108 Stat. 382, 1465 U.N.T.S. 85, art. 14(1) (emphasis added).

Congressional enactments and ratified treaties—to say nothing of customary international law—should not be set aside in favor of a strained reading of the FSIA to cover individual former foreign officials. Deference to the Congress and the Presidency is especially appropriate where, as here, the Constitution assigns the competency "to make Treaties," and "appoint Ambassadors, other public Ministers and Consuls" to the President—both with the advice and consent of the Senate—U.S. Const. Art. II, § 2, cl. 2, and where the Constitution assigns to Congress the power to "define and punish . . . Offenses against the Law of Nations." U.S. Const. Art. I, § 8, cl. 10.

II. APPLICATION OF FSIA IMMUNITY TO GOVERNMENT OFFICIALS WOULD NULLIFY THE TVPA

The statutory language and legislative history of the FSIA, as well as the legislative history of the TVPA, demonstrate that FSIA immunity should not apply so as to exempt private individuals from liability under the TVPA. Broadly speaking, this Court has long held that "private individuals of one nation" must be "amenable to the jurisdiction of the country" in which they are found. *The Schooner Exchange v. McFaddon & Others*, 11 U.S. (7 Cranch) 116, 144 (1812). In *The Schooner Exchange*, this Court concluded that "there are powerful motives for not exempting" private individuals "from the jurisdiction of the country in which they are found, and no one motive for requiring it." *Id.* Accordingly,

and in compliance with the holding of *The Schooner Exchange*, foreign officials who engaged in torture or extrajudicial killing under color of law are properly subject to suit under the TVPA when they are found within the jurisdiction of United States courts.

1. If Congress had intended to immunize individuals in the FSIA, it would have done so explicitly. Congress has drafted statutory language explicitly specifying "individuals" in other foreign relations contexts, yet chose not to do so here. For example, Congress enacted the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801-1871 [hereinafter FISA] to establish the exclusive means of electronic surveillance for foreign intelligence. 18 U.S.C. § 2511(2)(f) (2009). FISA defines "[p]erson" as meaning "any *individual*, including any officer or employee of the Federal Government, or any group, entity, association, corporation, or foreign power." 50 U.S.C. § 1801(m) (2009) (emphasis added). Similarly, when Congress enacted the Foreign Agents Registration Act of 1938, 22 U.S.C. § 611, *et seq.* (2009) [hereinafter FARA], it defined "person" to include "an *individual*, partnership, association, corporation, organization, or any other combination of individuals" to avoid any ambiguity about which foreign agents were required to register. 22 U.S.C. § 611(a) (2009) (emphasis added).

In contrast, the statutory language of the FSIA lacks any reference to "individuals." While FSIA immunity is granted to an "agency or instrumentality of a foreign state," this phrase is defined in terms of "entities." 28 U.S.C. § 1603. Consequently, in granting "a foreign state" immunity, the FSIA does not extend its immunity to individuals. A broad reading of FSIA immunity would effectively bar any

liability under the TVPA, rendering the statute meaningless and leaving victims without redress for atrocious acts of violence.

The TVPA provides a cause of action against any "individual" acting "under actual or apparent authority, or color of law, of any foreign nation," for torture or extrajudicial killing. 28 U.S.C. § 1350 note sec. 2. Thus, the defendant must: (1) be an individual; and (2) have some connection to the state in order to be liable for torture. The second requirement reflects the principle in international law, explicitly codified by Congress, that only torture by the state is actionable. *See* Convention Against Torture, art. 1 (limiting banned conduct to acts "inflicted *by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity*.") (emphasis added); *see also*, 137 CONG. REC. S1369-01, at S1378 (1991) (statement of Sen. Specter) ("The definition of 'torture' contained in the [TVPA] is taken from the Torture Convention."). In other words, any individual engaging in torture as defined by the Act must be an individual government actor. If the TVPA cannot be used to sue government officials for torture, there is simply no purpose for it to exist.

2. Along with the statutory language of the FSIA, the legislative history of the phrase "agency or instrumentality of a foreign state" also evidences a Congressional intent at odds with granting individuals FSIA immunity. That legislative history omits any reference to individuals, and instead lays out a demonstrative list that includes "a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement

agency or a department or ministry which acts and is suable in its own name." H.R. Rep. 94-1487, at 15-16 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604. In the face of that legislative history, this Court should decline any invitation to grant immunities where the political branches have not seen fit to provide them.

This interpretation of the FSIA's legislative history is bolstered by the legislative history of the TVPA, which reaffirms that Congress viewed the FSIA immunity as covering sovereigns, not individuals. Indeed, there are numerous references to the interplay between the two statutes in the legislative history of the TVPA. The House Report noted that "[s]ince few, if any foreign governments would admit to the use of torture, and would be immune from suit if they did so, the bill reaches only the individuals involved, not their governments." 134 CONG. REC. H9692-02, at H-9694 (1988) (statement of Rep. Mazzoli).

The Senate was even more explicit in its rationale for choosing to target individuals in the TVPA:

> The legislation uses the term 'individual' to make crystal clear that foreign states or their entities cannot be sued under this bill under any circumstances: only individuals may be sued. Consequently, the TVPA is not meant to override the Foreign Sovereign Immunities Act (FSIA) of 1976, which renders foreign governments immune from suits in U.S. courts, except in certain instances.

S. REP. NO. 102-249, at 7-8 (1991) (footnotes omitted). Indeed, immediately before the Senate passed the House version of the TVPA which ultimately became law, Counsel of Record explained:

> I do not believe that this act conflicts with the Foreign Sovereign Immunities Act. . . . [The TVPA] does not override the FSIA and allow a suit against the foreign state. It only allows a suit against the individual(s) responsible for the torture, either by performing it or ordering it.

138 CONG. REC. S2667-04, at S2668 (statement of Sen. Specter in response to Sen. Grassley) (1992). Thus, Congress was aware of the FSIA when it passed the TVPA and did not think that the former would be an impediment to lawsuits under the latter. As a result, Congress plainly understood the FSIA to provide immunity only to foreign governments and their institutional agencies, not to individuals, lest the TVPA be a dead letter upon enactment.

III. CONGRESS NEVER INTENDED FSIA IMMUNITY TO ATTACH TO FORMER FOREIGN OFFICIALS

Even assuming, *arguendo*, that the FSIA should extend immunity to current foreign officials, it should not be interpreted to cover former officials. The failure of the FSIA to address former foreign officials within its statutory text, this Court's own precedent, and the legislative history of the TVPA, combine to support the conclusion that FSIA immunity does not extend to former foreign officials.

1. If Congress had intended to bestow immunity on former foreign officials under the FSIA, it could have done so, as illustrated by existing federal statutes that extend special privileges to former domestic and foreign government officials. For example, in the domestic sphere, Congress has codified certain privi-

leges for former Speakers of the House, Presidents, and Vice Presidents.[6]

Likewise, in the international context, Congress enacted 18 U.S.C. § 1116(a), which makes it a federal crime to "kill[] or attempt[] to kill a foreign official, official guest, or internationally protected person . . . ." The law, in turn, defines "[f]oreign official" to include "a Chief of State or the political equivalent, President, Vice President, Prime Minister, Ambassador, Foreign Minister" and others "*or any person who has previously served in such capacity* . . . ." 18 U.S.C. § 1116(b)(3)(A) (2009) (emphasis added). Under the text of this law, anyone who killed or attempted to kill a former prime minister would be unambiguously guilty of a federal crime. Congress left no room for doubt that the provision it enacted served to protect those who had "previously served" as high-level officials. *Id.* Yet, the statutory language of the FSIA omits any reference to former officials of a foreign state. In short, "Congress clearly intended the TVPA to extend to former officials of foreign countries if they choose to come to the United States after leaving their positions of authority. Congress also stated that the FSIA does not extend immunity to such

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[6] *See, e.g.*, 2 U.S.C. §§ 31b-1 to 31b-7 (2009) (providing former Speakers of the House with an office, administrative allowance, mailing privileges, and staff assistance); 3 U.S.C. § 102 note sec. 4 (2009) (providing former Presidents with office space, staff compensation, communication services. and printing and postage privileges); 18 U.S.C. § 3056 (2009) (providing former Presidents, who entered office before January 1, 1997, and their spouses with Secret Service protection); Former Vice President Protection Act, Pub. L. No. 110-326, 122 Stat. 3560 (2008) (codified as amended in scattered sections of 18 U.S.C.) (providing Secret Service protection to former Vice Presidents and their family members).

individuals." 155 CONG. REC. S13869-01 (Statement of Senate Judiciary Committee Chairman Leahy) (2009).

2. The FSIA's application to current, but not former, foreign entities is further supported by this Court's decision in *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003). *Dole Food* held that the FSIA's "agency or instrumentality language" limits the grant of immunity to those agencies or instrumentalities in existence at the time suit is filed, not those agencies or instrumentalities in existence at the time that the tort was committed. *Id.* at 478. Accordingly, if a former foreign official is not a foreign agent at the time the suit is filed, then he is not entitled to immunity, even if he was a foreign agent at the time that he committed the actionable conduct. What matters, for purposes of FSIA immunity, is the former foreign entity's status at the time of the lawsuit.

3. If the Court were to allow FSIA immunity to extend to former, as well as current, foreign officials, it would render the TVPA practically meaningless. If foreign states, current foreign officials, and former foreign officials were all found to be beneficiaries of FSIA immunity, then the TVPA would be devoid of its strength as a civil liability statute and FSIA immunity would protect from liability nearly all conceivable TVPA defendants. This would be contrary to the TVPA's statutory language and legislative history, both of which demonstrate a Congressional intent to hold human rights violators, torturers and extrajudicial murderers civilly liable. *See* 28 U.S.C. § 1350 note; Senate Report, at 3-4.

In passing the TVPA, Congress did more than demonstrate its intent to hold human rights violators

and torturers civilly liable; it also sought to prevent them from seeking refuge in the United States after they flee the countries in which they committed acts of torture. During debate on the TVPA, Counsel of Record stated that "the [TVPA] is intended to deny torturers a safe haven in this country . . . [and] to discourage torturers from ever entering this country." 138 CONG. REC. S2667-04, at S2668 (1992). Representative Leach separately concurred, noting that "[i]t would be . . . revolting, however, if a torturer was physically present in the United States but could not be sued by the victim because of inadequacies or ambiguity in our present law." 135 CONG. REC. H6423-01, at H6426 (1989). Applying FSIA immunity to former foreign officials who commit torture would completely undermine the legislative intent of the TVPA and would, ironically, provide torturers with the same safe haven in the United States that Congress sought to deny them.

CONCLUSION

This Court should affirm the judgment below because foreign officials are not entitled to sovereign immunity under the FSIA.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 08-1555

IN THE

Supreme Court of the United States

MOHAMED ALI SAMANTAR,

Petitioner,

v.

BASHE ABDI YOUSUF, ET AL.,

Respondents.

On Writ of Certiorari to
the United States Court of Appeals
for the Fourth Circuit

BRIEF OF *AMICI CURIAE* MARTIN WEISS, GERALD ROSENSTEIN, PROGRESSIVE JEWISH ALLIANCE, ASSOCIATION OF HUMANISTIC RABBIS, JEWS AGAINST GENOCIDE, STOP GENOCIDE NOW, SAVE DARFUR COALITION, DARFUR AND BEYOND, DEFEND DARFUR DALLAS, TEXANS AGAINST GENOCIDE, SAN FRANCISCO BAY AREA DARFUR COALITION, AND MASSACHUSETTS COALITION TO SAVE DARFUR IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

More than a half-century ago, the United States played a leadership role in a series of trials in Nuremberg, Germany, that had a transformative effect on the international legal system. The Nuremberg trials marked a sea-change in the dignity afforded the Rule of Law in holding accountable persons who exploit government power to commit the most extreme atrocities against their fellow human beings. Among the most fundamental achievements of the trials was the recognition that persons who commit crimes against humanity cannot escape accountability by hiding behind the cloak of sovereign immunity, either as the authors of government policy or as those who simply follow the authors' orders. The Foreign Sovereign Immunities Act, enacted by the United States Congress three decades later, cannot, and should not, be interpreted in a way that undercuts this fundamental principle of law that the United States itself played a central part in establishing.[1]

Amici here represent individuals and associations with a very direct understanding of the importance of legal accountability in the modern

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[1] Counsel of Record for all parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than the *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

world. They include survivors of the Holocaust, who experienced first-hand the horrific events that led to widespread acceptance of the Nuremberg Principles. They also include persons and organizations who hope one day to see accountability exacted for subsequent human rights atrocities, including those occurring recently in Darfur.

Amicus Martin Weiss was born in an area of the former Czechoslovakia that was occupied by Axis forces after the outbreak of World War II. Mr. Weiss, his mother, father, four sisters, and an older brother were deported to Auschwitz. Of these family members, only Mr. Weiss and one sister survived. He emigrated to the United States in 1946. For many years, Mr. Weiss has volunteered as a speaker on the events of the Holocaust. Through the auspices of the U.S. Holocaust Museum, he addresses law enforcement groups on the roots of extremist violence, while also traveling across the nation to speak on the role that hatred, prejudice, and abuse of power play in causing genocide. He submits this brief in the hope that the promise of Nuremberg will be fulfilled, and that perpetrators of genocide will continue to know that they cannot escape legal responsibility for their crimes.

Amicus Gerald Rosenstein was born in Southern Germany in 1927 and emigrated with his family to Amsterdam in 1936. After Nazi Germany invaded the Netherlands, Mr. Rosenstein was deported East, moving from one concentration camp to another. He survived Auschwitz-Birkenau, a death march, and eventual liberation by the Russian Army. In the process, Mr. Rosenstein witnessed first-hand all the

horrors of the Holocaust. He submits this brief in support of the proposition that individuals who carry out the most heinous and inhumane acts cannot rely on the cloak of sovereign immunity to evade legal responsibility.

The mission of *Amicus* Progressive Jewish Alliance ("PJA") is to engage Jews of diverse backgrounds to learn, lead, and act in their local communities to create a more just and equal society. PJA serves as a vehicle connecting Jews to the critical social justice issues of the day and to the Jewish tradition of working for *tikkun olam* (repair of the world). At every level of government, the accountability of officials to the citizens and residents they govern is vital to the safe, secure operation of democracy. With the Jewish community's history of legalized persecution, torture, and genocide, PJA is committed to ensuring that such atrocities do not occur elsewhere and that government officials are held accountable for their actions.

Amicus Association of Humanistic Rabbis ("AHR") was founded in 1967 by rabbis committed to the values of a human-centered approach to Jewish life and culture. AHR views the protection of human rights as a cornerstone of this mission.

Amicus Jews Against Genocide was initially founded to respond to ethnically motivated attacks on civilians in Bosnia in the early 1990s. The organization has since expanded its advocacy on behalf of victims of large-scale human rights violations to include Kosovo, East Timor, Sierra

Leone, Sudan, Congo, and Burma. In the aftermath of the Holocaust, members of the group feel a particular responsibility to speak out as Jews for others in circumstances of massive violations of human rights.

Amicus Stop Genocide Now ("SGN") is an organization dedicated to working to protect populations in grave danger of violence, death, and displacement resulting from genocide. Through active education, advocacy, and policy change, SGN resolves to change the way the world responds to genocide.

Amicus Save Darfur Coalition is a coalition of almost two hundred organizations, representing hundreds of thousands of people, who have joined together in response to the crisis in Sudan to promote goals of ending the violence against civilians, facilitating adequate and unhindered humanitarian aid, establishing conditions for the safe and voluntary return of displaced people to their homes, promoting the long-term, sustainable development of Darfur, and holding the perpetrators of the violence accountable.

Amici Darfur and Beyond, Defend Darfur Dallas, Texans Against Genocide, San Francisco Bay Area Darfur Coalition, and Massachusetts Coalition to Save Darfur are organizations dedicated to stopping and addressing genocide in Darfur and around the world. These organizations submit this brief with the belief that the imposition of individual liability in a court of law is necessary to deter future acts of

genocide and other crimes against humanity, both in Darfur and elsewhere.

SUMMARY OF ARGUMENT

In the years following World War II, the United States played a critical leading role in establishing as a fundamental principle of international law the rule that perpetrators of genocide, mass torture, and other gross human rights violations cannot escape legal accountability for their actions through reliance on sovereign immunity. This is one of the bedrock propositions enshrined in the "Nuremberg Principles" developed during the Nuremberg trials and broadly accepted thereafter by the international legal community.

As explained by the Nuremberg Tribunal, the national courts that tried Adolf Eichmann and other war criminals, and a wide variety of other international and national tribunals and courts, crimes against humanity are ultimately committed by individuals and fall outside the scope of any legitimate sovereign authority. Application of sovereign immunity to shield the perpetrators of gross human rights abuses from legal accountability is thus fundamentally inconsistent with the bedrock international law principle – established at Nuremberg and repeatedly acknowledged since – that perpetrators of genocide, torture, and similar atrocities can be held accountable for their actions, not simply through the Power of the Sword, but through the Rule of Law.

This international legal principle was firmly established by the time the Foreign Sovereign

Immunities Act ("FSIA") was enacted in 1976. There is no indication that Congress intended the FSIA to undermine the legacy of Nuremberg in the manner sought by Petitioner here. This Court should not now construe the statute to impose such a result.

ARGUMENT

I. The Foreign Sovereign Immunities Act Should Be Construed in a Manner That Takes Appropriate Account of the Contemporaneous Legal Context at the Time of Its Enactment.

As the decision of the United States Court of Appeals for the Fourth Circuit in this case compellingly demonstrates, it is clear from the plain language of the Foreign Sovereign Immunities Act and its legislative history that the statutory grant of sovereign immunity does not extend to individual government officials – and that, even if it did, such an extension would not include a former official who has already left office. *Yousuf v. Samantar*, 552 F.3d 371, 380-83 (4th Cir. 2009). This Court should adopt the Fourth Circuit's reasoning, and it need look no further than the plain language of the statute to do so.

However, if the Court elects to inquire further, basic principles of statutory construction require that the FSIA be construed in a manner that takes proper account of the existing legal context at the time of its enactment. *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193, 201 (1979) (statute must be construed in light of "the historical context from which the Act arose"); *see also Sosa v. Alvarez-*

Machain, 542 U.S. 692, 714-23, (2004) (analyzing the historical context of the Alien Tort Statute). This legal context includes the contemporaneous international legal regime.

For the past 200 years, this Court has consistently recognized, as a fundamental principle of statutory construction, that (absent a clear statement of congressional intent) a statute should not be construed in a manner that is inconsistent with international law. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.") (Marshall, C.J.); *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004) (noting that the Court assumes Congress will generally attempt to follow international law). This rule should apply with particular force with respect to the rules of international law that the United States played a major role in establishing in the first place.

These principles of statutory construction apply with full force to the FSIA, which was enacted, not to create new expansive rules of sovereign immunity, but rather to "codif[y], as a matter of federal law, the restrictive theory of sovereign immunity" as then recognized by the United States and to "'assure[e] litigants that ... decisions are made on purely legal grounds....'" *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983) (quoting H.R. Rep. No. 94-1487, at 7 (1976)).

As shown below, it is – and was in 1976, when the FSIA was enacted – a firmly established principle of international law that an individual may not invoke sovereign immunity to escape legal accountability for genocide, crimes against humanity, mass torture, and other atrocities committed as a government official. The United States led the way in enshrining this principle in the prosecutions and judgments entered at Nuremberg. By the time the FSIA was enacted, the principle had been applied time and again to enforce the legal accountability of numerous individuals throughout the world. Absent a clear expression of congressional intent to reject this international legal principle – and there is none – the FSIA should similarly be interpreted as rejecting any application of sovereign immunity in this context.

II. The Post-World War II Legal Regime Eliminated Sovereign Immunity as a Barrier to Individual Accountability for Crimes Against Humanity.

A. The Nuremberg Principles Rejected Sovereign Immunity as a Barrier to Legal Action Against State Officials Who Commit *Jus Cogens* Violations.

There was once a time when the law recognized no meaningful distinction between the sovereign as the state and the sovereign – the king – as an individual; the immunity of one from accountability under the law was by definition the immunity of the other. By the middle of the Twentieth Century, however, the international legal regime (led, to a

large degree by the United States and other democracies) was well advanced in recognizing the critical legal distinction between the State and the persons who act in its name. The Versailles Treaty, for example, provided for prosecution of Kaiser Wilhelm II, although such a proceeding never actually took place. *See* ARCHBOLD INTERNATIONAL CRIMINAL COURTS: PRACTICE, PROCEDURE & EVIDENCE 770-73 (Karim A.A. Khan et al. eds., 2d ed. 2005) ("ARCHBOLD").

In a parallel trend, international law in the Twentieth Century increasingly called into question the existence of sovereign immunity with respect to "*jus cogens*" offenses – the breaching of certain fundamental rules at the apex of the international law hierarchy, such as the prohibitions against genocide, torture and war crimes. *See* Restatement (Third) of the Foreign Relations Law of the United States § 102, cmt. k, § 702; cmt. n (1987). The peremptory norms that are violated by a *jus cogens* offense stand outside the legitimate scope of sovereign authority and thus, by extension, outside the scope of protection afforded by sovereign immunity. *See* Colin B. Picker, *International Law's Mixed Heritage: A Common/Civil Law Jurisdiction*, 41 VAND. J. TRANSNAT'L L. 1083, 1091 (2008) ("[T]he concept of state sovereignty in international law has eroded with the growth of *jus cogens*, the

fundamental peremptory norms that apply to states regardless of their consent.").[2]

In the landmark Nuremberg trials of Nazi war criminals after World War II, these concepts came together in a recognition that official capacity cannot immunize government officials from liability for *jus cogens* violations. *See* ARCHBOLD, *supra*, at 770-73; *see also Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992) ("The universal and fundamental rights of human beings identified by Nuremberg – rights against genocide, enslavement, and other inhumane acts – are the direct ancestors of the universal and fundamental norms recognized as *jus cogens*.") (citation omitted). At Nuremberg, the United States and its allies invoked the Rule of Law to hold accountable persons who were personally responsible for the torture and deaths of tens of millions of people. In doing so, they recognized principles of universal applicability that extended far beyond the defendants' mere status as the losers in a war, or as the perpetrators of particular crimes against particular people. *See* TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUREMBERG WAR CRIMES TRIALS UNDER

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[2] Technically, the defense of "official capacity" or "act of state" is different from the doctrine of "sovereign immunity." The latter represents a threshold jurisdictional bar while the former constitutes a defense asserted once jurisdiction has been asserted by a court. *See* WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW 369-70 (2d ed. 2009). Although courts often refer to them interchangeably, *id.*, this brief focuses on the jurisdictional issues of sovereign immunity encompassed within the Court's grant of *certiorari*.

CONTROL COUNCIL LAW NO. 10 107 (1949) ("TAYLOR") (noting that "Nuernberg was based on enduring [legal] principles and not on temporary political expedients"). The defendants at Nuremberg – who included Hermann Goering, Adolf Hitler's principal deputy, and Admiral Karl Doenitz, who served as German Head of State following Hitler's suicide – were subject to prosecution for their crimes because the law held them to be accountable, regardless of their former positions as senior officials of the German government and military.

The first Nuremberg trial was held pursuant to the Charter of the International Military Tribunal ("IMT"), which was drafted principally by United States officials. *See* Laura A. Dickinson, *Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law*, 75 S. CAL. L. REV. 1407, 1469 (2002) ("[T]he primary impetus for the Nuremberg tribunal came from the United States [and] Justice Robert Jackson, the chief prosecutor for the United States, exercised a great deal of control in shaping the court and the prosecution."). The IMT Charter authorized prosecution of Nazi leaders for war crimes and crimes against humanity.[3]

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[3] *See* Charter of the International Military Tribunal, Article 7, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, *reprinted in* REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS 420-29 (1949).

Article 7 of the IMT Charter unequivocally declared: "The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment." *Id.* The rationale behind this principle was articulated in Justice Jackson's historic opening statement, which emphasized that persons, not abstract entities, are responsible for human rights violations:

> Of course, the idea that a state, any more than a corporation, commits crimes, is a fiction. Crimes always are committed only by persons. While it is quite proper to employ the fiction of responsibility of a state or corporation for the purpose of imposing a collective liability, it is quite intolerable to let such a legalism become the basis of personal immunity.
>
> The Charter recognizes that one who has committed criminal acts may not take refuge in superior orders nor in the doctrine that his crimes were acts of states. These twin principles working together have heretofore resulted in immunity for practically everyone concerned in the really great crimes against peace and mankind. Those in lower ranks were protected against liability by the orders of their superiors. The superiors were protected because their orders were called acts of state. Under the Charter, no defense based on either of these doctrines can be entertained. Modern civilization puts

> unlimited weapons of destruction in the hands of men. It cannot tolerate so vast an area of legal irresponsibility.

Robert Jackson, Opening Statement (Nov. 21, 1945), 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 98, 150 (1947).

The unassailable logic of Justice Jackson's argument was famously embraced by the IMT in its epochal judgment:

> It was submitted that ... where the act in question is an act of state, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal [this contention] must be rejected.... Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.... The principle of international law, which under certain circumstances protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.

Judgment of the International Military Tribunal at Nuremberg (Oct. 1, 1946), *reprinted in Judicial Decisions*, 41 AM. J. INT'L L. 172, 220-21 (1947).

The inapplicability of sovereign immunity was further reaffirmed in what came to be known as the "Subsequent Nuremberg Trials." After the IMT proceedings commenced, the Allied Control Council issued "Control Council Law No. 10," which established the basis for prosecution of other high-level Nazi officials. Article II(4)(a) of that instrument confirmed that "[t]he official position of any person, whether as Head of State or as a responsible official in a Government Department, does not free him from responsibility for a crime or entitle him to mitigation of punishment."[4]

Telford Taylor, assistant to Justice Robert Jackson at the initial IMT trial and Chief Counsel for War Crimes at the Subsequent Nuremberg Trials, explained in his final report to the Secretary of the Army the lasting significance of Nuremberg's rejection of official immunity:

> Nuernberg was a process, not an episode. Despite the stature of the IMT judgment, had it stood as the sole judicial utterance at Nuernberg it would have been subject to the unwarranted criticism that it was merely the product of the political forces of the moment. In fact, however, Nuernberg was based on enduring principles and not on temporary political expedients, and this fundamental point is apparent from the reaffirmation of

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[4] Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Dec. 20, 1945, *reprinted in* TAYLOR, *supra*, at 250.

> the Nuernberg principles in Control Council Law No. 10, and their application and refinement in the 12 judgments rendered under that law during the 3-year period, 1947 to 1949. During those years the international political situation underwent revolutionary changes, but the principles of Nuernberg continued to be applied there.

TAYLOR, *supra*, at 107.

Following the Pacific War, the International Military Tribunal for the Far East (IMTFE or Tokyo Tribunal), a court established in 1946 by the United States through orders of General Douglas MacArthur, also barred the defense of sovereign immunity in the trials of high-ranking Japanese officials accused of *jus cogens* violations.[5] In particular, Article 6 of the IMTFE Charter provided that "[n]either the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged...." Charter of the International Military

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[5] *See* Dickinson, *supra*, at 1469; Christopher P. DeNicola, *A Shield for the "Knights of Humanity": The ICC Should Adopt a Humanitarian Necessity Defense to the Crime of Aggression*, 30 U. PA. J. INT'L L. 641, 645 (2008) (describing creation of the Tokyo Tribunal as an effort to ensure that *jus cogens* perpetrators not "hide behind sovereign immunity" in order to "end the cycle of impunity").

Tribunal for the Far East, Jan. 19, 1946, art. 6, T.I.A.S. No. 1589, 4 Bevans 20, 22.

In 1946, the rebuff of the sovereign immunity defense for *jus cogens* violations was enshrined in one of the cornerstone documents of the international legal order established by the United States and its allies after the war – the "Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal" – commonly referred to as the "Nuremberg Principles." Principle III of that document reaffirms that "[t]he fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law." *See* Report of the International Law Commission Covering Its Second Session, at 11-14, U.N. Doc. A/1316 (June 5-July 29, 1950).

Thus, after World War II, it was firmly established, first by the actions of the United States and its allies, and then by the international community in general, that sovereign immunity is no barrier to legal action seeking to hold accountable government officials who invoke the power of the state to commit widespread murder, torture, and other *jus cogens* offenses. With the leadership of the United States, this principle became a cornerstone of international law.

B. National Courts Embraced the Nuremberg Principle that Individuals May Not Escape Liability for Human Rights Abuses By Asserting Sovereign Immunity.

1. The Landmark Trial of Adolf Eichmann Explained and Reinforced the Unavailability of Sovereign Immunity as a Defense to Individual Accountability.

In the decades following World War II, the Nuremberg principle on sovereign immunity was widely recognized and accepted by national courts. One of the most thorough analyses of the issue was provided in connection with the trial of Adolf Eichmann. Eichmann was the Nazi SS official responsible for coordinating the arrest, selection, transport and reception of millions of Jews throughout Europe to death camps and slave labor sites, as well as the seizure and sequestration of Jewish property. *See* Matthew Lippman, *Genocide: The Trial of Adolf Eichmann and the Quest for Global Justice*, 8 BUFF. HUM. RTS. L. REV. 45, 50-51 (2002). In 1960, Israeli agents captured Eichmann in Argentina, and he was prosecuted in Israel pursuant to that country's universal jurisdiction statute – the Nazis and Nazi Collaborators (Punishment) Act of 1950 – for crimes against humanity and war crimes. *Id.* at 53-54, 67.

As a former official in the German government, Eichmann claimed he was exempt from liability under the principle of sovereign immunity as his

conduct could only be considered "acts of state." *See Attorney-General of the Government of Israel v. Adolf Eichmann*, 36 I.L.R. 18, ¶ 28, (Dist. Ct., Dec. 12, 1961) (1968) ("*Eichmann* District Court Judgment"), *aff'd* 36 I.L.R. 277 (Sup. Ct., May 29, 1962) (1968) ("*Eichmann* Supreme Court Judgment"). The Israeli District Court explained why this argument necessarily failed:

> Only when official organs of sovereignty participated in atrocities and persecutions did those crimes assume international proportions. It can scarcely be said that governmental participation, the proof of which is necessary for conviction, can also be a defence in the charge.... The repudiation of the contention as to an 'Act of State' is one of the principles of international law that were acknowledged by the Charter and Judgment of the Nuremberg Tribunal, and were unanimously affirmed by the United Nations Assembly in its Resolution of 11 December 1946.

Eichmann District Court Judgment, ¶ 28.

Applying similar reasoning, Israeli Supreme Court "utterly reject[ed]" the defense of sovereign immunity:

> In any event, there is no basis for the doctrine when the matter pertains to an act prohibited by the law of nations, especially when they are international crimes in the class of 'Crimes against Humanity' (in the wide sense). Of such heinous acts it must be

> said that they are completely outside the 'sovereign' jurisdiction of the State that ordered or ratified their commission, and therefore those who participated in such acts must personally account for them and cannot seek shelter behind the official character of their task or mission, or behind the 'Laws' of the State by virtue of which they purported to act.
>
> Their case may be compared with that of a person who, having committed an offence in the interests of a corporation which he represents, is not permitted to hide behind the collective responsibility of the corporation therefor. In other words, international law postulates that it is impossible for a State to sanction an act that violates its severe prohibitions, and from this follows the idea which forms the core of the concept 'international crime': that a person who was a party to such a crime must bear individual responsibility for his conduct.

Eichmann Supreme Court Judgment, ¶ 14.

2. Other National Courts Also Accepted the Nuremberg View of Sovereign Immunity.

Numerous other national courts also prosecuted former government officials for atrocities and other crimes committed during World War II. Consistent

with the Nuremberg Principles, not a single jurisdiction treated official capacity as a bar to legal accountability.[6] Thus, for example, Vidkun Quisling was convicted and ultimately executed notwithstanding his position as "Minister-President" for the collaborationist Norwegian government.[7] Marshal Philippe Pétain was similarly convicted notwithstanding the fact that his crimes were committed in his capacity of Chief of State for Vichy France.[8]

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[6] *See* Istvan Deak, *Retribution against Heads of State and Prime Ministers*, LOGOS JOURNAL, Summer 2007, *available at* http://www.logosjournal.com/issue_6.3/deak.htm (hereinafter "Heads of State"); *see generally* Istvan Deak, *Post World War II Political Justice in a Historical Perspective*, 149 MIL. L. REV. 137 (1995).

[7] *See* Drexel Sprecher, *Telford Taylor Panel: Critical Perspectives on the Nuremberg Trial*, 12 N.Y.L. SCH. J. HUM. RTS. 453, 533-34 (1996).

[8] *See* John Hilla, *The Literary Effect of Sovereignty in International Law*, 14 WIDENER L. REV. 77, 143 (2008). Others who similarly found no refuge in the sovereign immunity defense during their post-war trials included, among others, Pierre Laval in France (Pétain's Prime Minister), Ioannis Rallis (Prime Minister of Greece), Risto Ryti (President of Finland), and Laszlo Bardossy (Prime Minister of Hungary). *See* Deak, Heads of State, *supra*.

III. The Nuremberg Rejection of Sovereign Immunity as a Shield for Perpetrators of Human Rights Abuses Remains a Vital Component of the International Legal Regime.

The principles established at Nuremberg and in other proceedings against the war criminals of the 1930s and 1940s were not specialized or limited to the events of that era. Sadly, the Holocaust survivors' pledge of "Never Again!" has yet to be redeemed, as the late Twentieth Century and the beginning of the Twenty-First have been marked by massive human rights violations in places such as Rwanda, Cambodia, Darfur, and the former Yugoslavia. *See generally* Kelly Dawn Askin, *"Never Again" Promise Broken Again. Again. And Again*, 27 CARDOZO L. REV. 1723, 1723-28 (2006) (reviewing record of atrocities post World War II).

While the task of calling the perpetrators of these atrocities to account has in many instances scarcely begun, those who have so far sought to do so have consistently hewed to the Nuremberg precedent on the issue of sovereign immunity.[9] And, as at Nuremberg, the United States has regularly been at the forefront in promoting the use of the Rule of Law, unencumbered by claims of sovereign immunity, to

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[9] As Justice Breyer observed in his concurring opinion in *Sosa*, there is also international "procedural agreement that universal jurisdiction exists" to bring legal action against the perpetrators of "torture, genocide, crimes against humanity, and war crimes." 542 U.S. at 762.

hold accountable persons guilty of such severe human rights abuses. For example:

- In 1993, the United States spearheaded the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) and played a leading role in drafting its statute (which was appended to Security Council Resolution 827, which created the Tribunal).[10] Article 7 of the ICTY Statute provides that "[t]he official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment."[11] This provision was applied in the subsequent prosecution of, among others, Slobodan Milosevic, the former President of Serbia.[12]

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[10] *See* Patricia M. Wald, *International Criminal Courts – A Stormy Adolescence*, 46 VA. J. INT'L L. 319, 321 (2006).

[11] The Secretary-General, *Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia*, Annex 1, art. 7(1), U.N. Doc. S/25704 (May 3, 1993).

[12] *See Prosecutor v. Milosevic*, Case No. ICTY-99-37-PT, Decision on Preliminary Motions, ¶¶ 26-34 (Nov. 8, 2001) (the lack of immunity of heads of state for war crimes, genocide, and other crimes against humanity "reflects a rule of customary international law....").

- In response to the 1994 Rwandan genocide, the United States championed the creation of the International Criminal Tribunal for Rwanda (ICTR) and once again took the lead in drafting its statute, which was appended to the Security Council Resolution creating the Tribunal.[13] Article 6(2) of the ICTR statute addresses the issue of sovereign immunity in terms identical to those of the ICTY Statute, and subsequent proceedings under that statute have again pursued former officials for their human rights offenses.[14]

- The Statute of the Special Court for Sierra Leone contains provisions identical to those of the ICTY and ICTR statutes, thus permitting prosecution of Charles Taylor, former President of Liberia, for gross human rights violations.[15]

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[13] *See* Robert Cryer, *Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study*, 11 J. CONFLICT & SECURITY L. 239, 250 (2006).

[14] *See* S.C. Res. 955, Annex 1, art. 6(2), U.N. Doc. S/RES/955 (July 1, 1994); *see generally Prosecutor v. Kambanda*, Case No. ICTR 97-23-S, Judgment and Sentence (Sept. 4, 1998) (sentencing ex-Prime Minister for genocide and other crimes).

[15] *See* The Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, Enclosure, art. 6(2), U.N. Doc. S/2000/915 (Oct. 4, 2000).

- Article 29 of The Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia similarly provides that "[t]he position or rank of any Suspect shall not relieve such person of criminal responsibility or mitigate punishment."[16] This statute permitted prosecution of several high-ranking Khmer Rouge officials.

- Applying the same principle, former Iraqi leader Saddam Hussein was prosecuted under a law providing that "[t]he official position of any accused person, whether as president of the State, chairman or member of the Revolution Command Council, prime minister or member of the cabinet, or a member of the leadership of the Ba'ath Party, shall not relieve such person of criminal responsibility...."[17]

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[16] Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, art. 29, NS/RKM/1004/006 (as amended Oct. 27, 2004), available at http://www.eccc.gov.kh/english/law.list.aspx; *see* Padraic J. Glaspy, *Justice Delayed? Recent Developments at the Extraordinary Chambers in the Courts of Cambodia*, 21 HARV. HUM. RTS. J. 143, 147-53 (2008).

[17] Law of the Supreme Iraqi Criminal Tribunal (Law Number 10 of 2005), art. 15, Official Gazette of the Republic of Iraq (Oct. 18, 2005); Eric H. Blinderman, *The Conviction of Saddam Hussein for the Crime against Humanity of "Other Inhumane Acts"*, 30 U. PA. J. INT'L L. 1339 (2009).

The same principles have been applied in the first efforts to hold accountable persons responsible for the genocide in Darfur. The international community – including the United States – has broadly condemned the perpetrators of these atrocities and called for responsive action.[18] In March 2005, the United Nations Security Council referred the situation in Darfur to the Prosecutor of the International Criminal Court.[19] The ICC has issued arrest warrants for several Sudanese leaders, including President Omar al Bashir.[20]

In its decision on the Bashir Arrest Warrant, the ICC Pre-Trial Chamber referred to Article 27 of the ICC Statute and ruled that President Bashir was subject to arrest and prosecution regardless of his status as sitting head of state: "[The] current position of Omar Al Bashir as Head of a state which is not a party to the Statute, has no effect on the Court's jurisdiction over the present case."[21] One

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[18] In September 2004, for example, the United States government declared that genocide had been committed in Darfur. *See* Colin Powell, Testimony before the Senate Foreign Relations Committee (Sept. 9, 2004), available at http://2001-2009.state.gov/secretary/former/powell/remarks/36042.htm.

[19] S.C. Res. 1593, ¶ 1, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

[20] John E. Tanagho & John P. Hermina, *The International Community Responds to Darfur: ICC Prosecution Renews Hope for International Justice*, 6 LOY. U. CHI. INT'L L. REV. 367, 385 (2009).

[21] *Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, § 41 (Pre-Trial Chamber I, March 4, 2009). Article 27 of the ICC Statute provides that (continued...)

commentator has noted that "[i]mplied in the Court's statements is the view that the Security Council has implicitly ... sanctioned the exercise of jurisdiction by the Court over a serving head of state who would otherwise be immune from jurisdiction."[22]

Thus, from at least 1946 up through today, it has become universally accepted that a person who exploits a government position to commit gross human rights violations may not hide behind that

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"official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility...." Rome Statute of the International Criminal Court, art. 27, July 17, 1998, 37 I.L.M. 999, 1017, 27 U.N.T.S. 90.

[22] Dapo Akande, *The Legal Nature of Security Council Referrals to the ICC and Its Impact on Al Bashir's Immunities*, 7 J. INT'L CRIM. JUST. 333, 336 (2009). This is consistent with the view of the International Law Commission, which drafted the preliminary version of the ICC Statute. As that body observed more than a decade ago:

> It would be paradoxical to allow the individuals who are, in some respects, the most responsible for the crimes covered by the [Code of Crimes against the Peace and Security of Mankind] to invoke the sovereignty of the State and to hide behind the immunity that is conferred on them by virtue of their positions particularly since these heinous crimes shock the conscience of mankind, violate some of the most fundamental rules of international law and threaten international peace and security.

Report of the International Law Commission on the Work of its Forty-Eighth Session, commentary (1) to art. 7, U.N. Doc. A/51/10 (May 6-July 26, 1996).

position when finally brought to account for those acts. Indeed, in the case of the Darfur, this principle has even been extended to a serving head of state. Defendant Samantar, of course, is not a serving official; rather, he is seeking to enjoy a comfortable retirement in the United States.[23] In his case, it is crystal clear that international law recognizes no defense of sovereign immunity to permit him to escape legal accountability for human rights abuses.

IV. The Principles Established at Nuremberg Have Necessary and Appropriate Application to the Statutory Remedies Plaintiffs Seek to Invoke in This Case.

Although the Nuremberg Principles had their primary genesis in criminal proceedings, they are of equal importance in both the criminal and civil contexts. The genius of Nuremberg was not its invocation of criminal law specifically – it was, rather, its invocation of the Law itself as the proper mechanism for holding perpetrators of gross human

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[23] In the context of gross human rights violations of the type at issue in this case, the question of whether sovereign immunity applies to private tort actions against *serving* government officials is largely moot. Few, if any active perpetrators of gross human rights abuses are likely to find themselves within the personal jurisdiction of any U.S. court while still in office, and those that are would presumably seek to available themselves of diplomatic immunity or other separate defenses not at issue on this appeal. Notwithstanding the effort represented by the Darfur warrants, history shows that legal accountability of any kind for major human rights abuses nearly always follows the removal of the perpetrators from office.

rights violations accountable for their actions.[24] And if sovereign immunity is no bar to criminal prosecution, it surely cannot stand as a barrier to civil liability, where there is much less at stake. It would be strange indeed if the principles of comity upon which sovereign immunity is based were interpreted to permit former government officials to be arrested, tried, and even executed – but not to be subject to monetary damages for their wrongful acts.

Moreover, in the context of the Alien Tort Statute and the Torture Victim Protection Act, "reliance on criminal law norms seems entirely appropriate given that ... international law does not maintain [a] kind of hermetic seal between criminal and civil law...." *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 270-71, 270 n.5 (2d Cir. 2007) (citing *Sosa*, 542 U.S. at 762-63 (Breyer, J., concurring)). As Justice Breyer observed in *Sosa*, "the criminal courts of many nations combine civil and criminal proceedings, allowing those injured by criminal conduct to be represented, and to recover damages, in the criminal proceeding itself." 542 U.S. at 762-63. *See also Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, ¶ 155 (Dec. 10, 1998) (recognizing the propriety of civil remedies for violations of international criminal law in certain circumstances, noting for example that a torture

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[24] Following the Subsequent Nuremberg Trials of German industrialists, their companies were seized from them as part of the punishment for their crimes. *See* WILLIAM MANCHESTER, THE ARMS OF KRUPP 734-37 (Bantam Books 1970) (1968).

victim might "bring a civil suit for damage in a foreign court.").

While the United States legal system does distinguish between civil and criminal proceedings, it similarly recognizes the critical importance of civil liability in ensuring full legal accountability, including for conduct that is itself criminal. *Cf. Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 275 (1989) (noting that the civil remedy of punitive damages "advance[s] the interests of punishment and deterrence, which are also among the interests advanced by the criminal law").

Criminal prosecution is often unavailable due to constraints on resources or other factors, and even where available it may provide little or no redress to the victims. The empowerment of private plaintiffs with a personal incentive to seek justice provides an important mechanism for ensuring that persons harmed by human rights violations are called to account. *See Kadic v. Karadzic*, 70 F.3d 232, 240 (2d Cir. 1995) ("Although the jurisdiction authorized by section 404 [of Restatement (Third) of the Foreign Relations Law of the United States] is usually exercised by application of criminal law, international law also permits states to establish appropriate civil remedies, *id.* § 404 cmt. b, such as the tort actions authorized by the Alien Tort Act."); *see also Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) (permitting civil claims under the ATS is an "important step in the fulfillment of the ageless dream to free all people from brutal violence."); *Chavez v. Carranza*, 559 F.3d 486, 492 (6th Cir.

2009) ("The TVPA and the ATS share a common purpose in protecting human rights internationally."); *Papa v. U.S.*, 281 F.3d 1004, 1012 (9th Cir. 2002) ("The TVPA, like the ATCA, furthers the protection of human rights...Moreover, it employs a similar mechanism for carrying out these goals: civil actions.").

Reversal of the Court of Appeals' decision here would all but eliminate the ability of the civil law to address human rights violations. As the *Eichmann* decisions pointed out, it is the perpetrators' ability to exercise governmental power that typically permits such violations to occur in the first place. Permitting the perpetrators of such acts to escape civil liability *because* their acts were committed using government power – permitting the worst violations to escape full punishment in large part *because* they are the worst violations – is directly contrary to both the Nuremberg Principles and to the underlying purposes of the statutes plaintiffs invoke here. It would, for example, effectively nullify the TVPA – a statute that by its very terms creates a civil remedy against persons who act "under actual or apparent authority ... of any foreign nation." 28 U.S.C. § 1350, note 2(a). Indeed, the TVPA (which was enacted after the FSIA) clearly reflects a congressional understanding that persons acting "under actual or apparent authority ... of any foreign nation" may be sued in U.S. courts notwithstanding the "actual ... authority" that they previously enjoyed. *See Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 444-45 (1987) (noting the "longstanding practice" of construing related statues together).

As the Court of Appeals observed below, sovereign immunity is a principle of comity intended to ease existing relations with other states. *Yousuf*, 552 F.3d at 382 (citing *Republic of Austria v. Altmann*, 541 U.S. 677, 696 (2004)). United States law recognizes no independent interest in protecting the former officials of foreign regimes from the full consequences of human rights violations they have committed. To the contrary, United States law, as reflected in the ATS and TVPA, reflects a judgment that former government officials *may* be called to account for their human rights abuses and that U.S. courts *should* provide a forum for such claims. *See, e.g.*, *Filartiga*, 630 F.2d at 890 (finding jurisdiction appropriate under the ATS because "the nations of the world ... recognize that respect for fundamental human rights is in their individual and collective interest.").

Nothing in the language or legislative history of the FSIA supports the conclusion that Congress intended to abrogate the Nuremberg Principles as applied in U.S. courts. This Court should accordingly refrain from imposing any such limitation and should affirm the judgment below.

V. CONCLUSION

At Nuremberg, the United States led the way in establishing the principle that perpetrators of genocide, mass torture, and similar atrocities cannot escape legal accountability for their actions by invoking sovereign immunity. This principle – which has been reconfirmed and applied repeatedly in the decades since – was a critical component of the

existing international legal regime when the FSIA was enacted. There is no indication in either the language or legislative history of the FSIA that Congress intended that statute to repudiate the hard-won fruits of Nuremberg. The judgment below should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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BASHE ABDI YOUSUF, *et al.*,
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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE ZIONIST ORGANIZATION OF AMERICA, THE AMERICAN ASSOCIATION OF JEWISH LAWYERS AND JURISTS, AGUDATH ISRAEL OF AMERICA, AND THE UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA, *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI*[1]

[1] No person, organization or corporation other than the amici and the organizations named herein have assisted in or contributed to the preparation of this brief. The parties have consented to the filing of this brief.

The legal issues presented by this case are of great importance to the First Amendment protected activities of the *amici* in the United States. The *amici* are all Jewish organizations that support the State of Israel and that benefit from visits to the United States of current and former Israeli leaders. These organizations are also concerned for the freedom of government officials in Israel – America's most trusted ally in the Middle East – to take effective action to preserve the safety and security of that country's residents and effectively to counter the enemies of Israel and the United States.

The decision of the Fourth Circuit that permits civil lawsuits to be brought against current and former government officials notwithstanding the immunity that their governments have under the Foreign Sovereign Immunities Act will, if not reversed by this Court, encourage the institution of many unfounded lawsuits in United States courts against present and former government officials of the State of Israel as part of the campaign being waged against Israel known as "Lawfare." Such lawsuits have, to this date, been infrequent in this country because the decisions of five Circuits have clearly held that they should be dismissed at their inception because of the immunity provided by the Foreign Sovereign Immunities Act. But if that dam is breached by an affirmance of the decision below, courts in the United States will see a flood of baseless lawsuits that will be initiated, as they have been in various foreign countries, as a strategy utilized by the enemies of Israel.

In addition, affirmance of the Fourth Circuit's ruling will surely stifle speaking engagements, scholarly visits, and public appearances in the United States by current and former government officials of the State of Israel. Concern over having to defend against possible civil lawsuits in the United States may also inhibit objective decision-making in the public interest by Israeli government officials.

For these reasons – in addition to the arguments relating to statutory construction of the Foreign Sovereign Immunities Act presented in the Brief of Petitioner – the *amici* urge this Court to reverse the decision of the Fourth Circuit and to establish, as the law of the land, the rule of the Second, Fifth, Sixth, Ninth and D.C. Circuits that individuals who are sued for acts they performed in their official capacities on behalf of a foreign sovereign may have the lawsuits against them dismissed at their inception, both while and after they occupy their official governmental posts.

IDENTIFICATION OF THE *AMICI*

The American Association of Jewish Lawyers and Jurists ("AAJLJ") represents the American Jewish legal community in defending Jewish interests and human rights in the United States and abroad.

The Zionist Organization of America ("ZOA"), founded in 1897, is the oldest pro-Israel organization in the United States, whose leaders have included U.S. Supreme Court Justice Louis Brandeis, Rabbi Dr. Abba Hillel Silver and Rabbi Stephen Wise. The

ZOA works to strengthen United States-Israel relations and to combat anti-Israel and anti-Jewish bias in the media, in schools and in textbooks, and on college campuses. ZOA conducts events to which it invites present and former Israeli government officials.

Agudath Israel of America is a national Orthodox Jewish membership organization with offices, chapters, affiliated synagogues, and individual members across the United States. It is affiliated with a political party in the State of Israel whose representatives are members of the Israeli legislature ("Knesset") and are frequent speakers and participants at Agudath Israel of America functions in the United States.

The Union of Orthodox Jewish Congregations of America ("U.O.J.C.A.") is the largest Orthodox Jewish umbrella organization in North America, representing nearly one thousand congregations. Through its Institute for Public Affairs, the U.O.J.C.A. represents the interests of its national constituency on public policy issues. Israeli leaders are frequently invited to address meetings and other events conducted by the U.O.J.C.A.

ARGUMENT

I.

INDIVIDUAL FOREIGN GOVERNMENT OFFICIALS NEED ABSOLUTE IMMUNITY FROM CIVIL LAWSUITS IN THE UNITED STATES TO PREVENT PERSONAL RETALIATION FOR NECESSARY BUT CONTROVERSIAL POLICIES

We draw the Court's attention to an area of foreign affairs with which these *amici* are most familiar and most concerned – the ongoing Israeli-Arab dispute in the Middle East. Emotions run high over much of the world with regard to this controversy, and the actions of the Israeli government in defense of its citizens are often criticized in the United States.

Israel's adversaries are ready to pursue all possible means to hinder measures that duly elected Israeli leaders feel are necessary for Israel's self-defense. Lawsuits against Israeli officials in foreign judicial forums is one tactic that has recently been used with success by supporters of the Palestinian cause in the Middle East. A report in *The National* dated October 12, 2009, began: "Almost 1,000 lawsuits alleging war crimes by Israeli ministers and military personnel have now been filed around the world, Israel has admitted." An October 30, 2009, Institute for Policy Studies story (http://geopolitics.net/wordpress/2009/10/30) reported that "[t]he Israeli defence ministry's prosecution

department has received about 1,500 notices of future civil lawsuits against the Israeli Defence Forces (IDF) over damage caused to Palestinians and their property, and loss of earning capacity during Operation Cast Lead, Israel's codename for its three-week attack on the coastal territory." This tactic of forcing Israeli officials to defend against criminal prosecutions and civil lawsuits has been pursued in Belgium, Switzerland, New Zealand, the United Kingdom, Denmark, the Netherlands, Canada and the United States. It is popularly called "Lawfare." Wall Street Journal, November 5, 2008 ("Lawfare Against Israel").

The Israeli daily *Yediot Aharonot* reported in its weekly supplement of November 20, 2009, that a "Wanted" list of individual Israeli past and present government officials targeted for arrest or suit in foreign jurisdictions includes the following: Ehud Barak (former Prime Minister and current Minister of Defense), Gabi Ashkenazi (Israel Defense Forces Chief of Staff), Eliezer Shakdi (Israel Defense Forces Air Force Commander), Matan Vilnai (Deputy Minister of Defense), Avi Dichter (former Minister of Internal Security), Carmi Gillon (Head of Shabak, Israeli General Security Service), Giora Eiland (former Chairman of National Security Council), Ehud Olmert (former Prime Minister), Amir Peretz (former Minister of Defense), Shaul Mofaz (former Minister of Defense and Israel Defense Forces Chief of Staff), Tzipi Livni (former Foreign Minister), Dan Halutz (former Israel Defense Forces Chief of Staff), Moshe Ya'alon (Deputy Prime Minister and former Israel Defense Forces Chief of Staff), Binyamin Ben-

Eliezer (former Deputy Prime Minister and Minister of Defense), and Doron Almog (Israel Defense Forces Major General and Commander, Gaza Strip Force). According to the *Yediot Aharonot* article, legal actions are being arranged by a network of attorneys in England, Ireland, Spain, Holland and New Zealand – countries where arrests of foreigners by private citizens are possible.

Criminal charges and civil lawsuits against these current or past Israeli leaders are brought in the hope of impeding the independent exercise of individual judgments by Israeli government officials. Given human nature, they are likely to have some effect. The policy reasons articulated by this Court for according absolute immunity to prevent unfounded retaliatory lawsuits against legislators (*Tenney v. Brandhove*, 341 U.S. 367 (1951)), judges (*Pierson v. Ray*, 386 U.S. 547, 554-555 (1967)), prosecutors (*Imbler v. Pachtman*, 424 U.S. 409, 424-426 (1976)), and judicial officers and government litigators (*Butz v. Economou*, 438 U.S. 478, 511-517 (1978)), apply fully to the situation of foreign government officials. *See also Nixon v. Fitzgerald*, 457 U.S. 731, 751-756 (1982).

The Court observed in the *Imbler* case that "harassment by unfounded litigation" would cause a prosecutor to "shade his decisions instead of exercising the independence of judgment required by his public trust." 424 U.S. at 423. In *Butz v. Economou*, the Court observed that "discretion which executive officials exercise . . . might be distorted if their immunity from damages arising

from that decision was less than complete" and that "there is a serious danger that the decision . . . will provoke a retaliatory response." 438 U.S. at 516.

The avalanche of "unfounded litigation" that is now being heaped on present and former Israeli government officials in European courts and is threatened in the United States (dependent, of course, on the outcome of this case) is plainly retaliatory and is also designed to force Israeli government officials to "shade" decisions made while in public positions out of concern that they may be sued in foreign courts.

The court below recognized that the Foreign Sovereign Immunities Act grants absolute immunity to a foreign government such as Israel for the actions of its officials. Such immunity destroys any incentive for filing an "unfounded lawsuit" against the foreign government itself because the effect of absolute immunity is to defeat a suit at the outset (*see Imbler*, 424 U.S. at 413, n. 13) without requiring the defendant to do anything more than move for dismissal.

The same cannot be said for qualified or common-law immunity which requires a defendant to make an affirmative showing to the court that he or she is entitled to immunity. *See, e.g., Gupta v. Thai Airways Int'l, Ltd.*, 487 F.3d 759, 763 n.6 (9th Cir. 2007) ("foreign sovereign immunity is an immunity from suit rather than a mere defense to liability"); *Rush-Presbyterian-St. Luke's Medical Center v. Hellenic Republic*, 877 F.2d 574, 576 n. 2 (7th Cir.

1989), *cert. denied*, 493 U.S. 937 (1989) ("sovereign immunity is an immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits").

But the Fourth Circuit refused to extend absolute immunity to individuals who occupy the decision-making posts from which government policy is formulated and implemented. This limitation has the practical real-world effect of eviscerating the statutory immunity. If concern over the need to defend against possible unfounded litigation justifies absolute immunity, it is *more* essential that the immunity be granted to individuals than to the governmental entities they administer. Few government officials can ignore totally the possibility that for the rest of their lives they will be hounded in foreign jurisdictions by civil lawsuits challenging actions they take while they exercise governmental authority. The immunity of their government is of less personal concern to them, and they can reasonably believe that the government will successfully defend, with its own resources, against future baseless lawsuits.

We believe that the reason why the "Lawfare" lawsuits have, to this date, been infrequent in the United States is that the lawyers who would initiate them know from the decisions of the Second, Fifth, Sixth, Ninth, and D.C. Circuits that complaints would promptly be dismissed on grounds of sovereign immunity. But if the floodgates are opened by an affirmance of the Fourth Circuit's decision a

torrent of unfounded lawsuits against Israeli government officials is likely to result.

II.

INDIVIDUAL FOREIGN GOVERNMENT OFFICIALS SHOULD NOT BE DETERRED FROM VISITING THE UNITED STATES

A consequence of the Fourth Circuit's decision is that former or current government officials such as the Israelis who have been targeted for civil suits will avoid visits to the United States in order not to be served with process in unfounded lawsuits. Newspaper reports have described incidents in which former Israeli officials and military personnel have chosen to abort visits to foreign countries when they have learned of efforts to arrest them or to initiate lawsuits against them. *E.g.*, Manchester Guardian, September 12, 2005 ("Israeli Evades Arrest at Heathrow Over Army War Crime Allegations").

The *amici* are American organizations that have invited current and past Israeli government officials to visit the United States to address seminars, dinners, and other meetings. There are also many educational institutions and research institutes that benefit from an exchange of information with present and former foreign government officials including Israeli leaders. For example, Moshe Ya'alon – one of those "targeted" for legal action – visited the United States "as a fellow at a

Washington, D.C., think tank" and thereby became "available for service of process." *Belhas v. Ya'alon*, 515 F.3d 1279, 1281 (D.C. Cir. 2008). A rule of law that would deny to individual government officials the immunity conferred on their government by the Foreign Sovereign Immunities Act would surely chill, if not foreclose, future visits by them to the United States.

The First Amendment protects not only the right to speak but also the right to hear and receive ideas. In *Board of Education, Island Trees Union Free School District No. 26* v. *Pico*, 457 U.S. 853, 867 (1982), this Court quoted approvingly Justice Brennan's endorsement of this right to receive ideas in his concurring opinion in *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965),:"[T]he right to receive publications is . . . a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." *See also Martin v. Struthers*, 319 U.S. 141, 143 (1943) ("The right of freedom of speech and press . . . embraces the right to distribute literature, and necessarily protects the right to receive it.")

In considering the interests that Congress weighed when it enacted the Foreign Sovereign Immunities Act, the Court should be sensitive to the probable impact on the First Amendment right of American groups to *receive* information if current and former officials of foreign governments may be subjected to "unfounded litigation" when they come

to the United States for lectures or colloquia. We are not contending that the First Amendment right to hear and learn from an Israeli government official is, in and of itself, sufficient to override a law that would explicitly deny immunity. Nor are we arguing that these *amici* would have standing to initiate a lawsuit challenging the denial of immunity if it had been explicitly prescribed by statute. But we maintain that the probable impact of the Fourth Circuit's decision on the flow of information into the United States from present and former officials of foreign governments is a weighty constitutional consideration in the decision of this case.

CONCLUSION

The decision and judgment of the Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

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